150 U.S. 85, 90

RECORD, CASE No. 13,867.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No., ~~253~~. 38

THE SCHUYLER NATIONAL BANK OF SCHUYLER, NEBRASKA, PLAINTIFF IN ERROR,

vs.

JOHN G. BOLLONG.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

FILED OCTOBER 21, 1889.

against the sufficiency of the complaint or petition of the plaintiff below were called to the attention of the Supreme Court of Nebraska."

The trial in the State Court was governed by the procedure and practice under the Nebraska Code. See Secs. 1, 2, 92, 121, 125, 136, 141, and 145, and Maxwell's Code Pleading, p. 107.

That the right should have been specifically set up and claimed, it was necessary that it be presented to the trial court, again urged in plaintiff's motion for a new trial, and then presented to the Supreme Court of Nebraska by its petition in error. This was not done. Nos. 18 and 19 in plaintiff's petition in error (R. 6) are only the statutory grounds. See Sec. 314 of Nebraska Code.

If we concede that there is sufficient in the record to have presented the question to the Supreme Court of Nebraska, still this does not benefit the plaintiff in error, as the objections, or rights claimed, were not specially set up so as to entitle the plaintiff in error to review in this Court.

And the Nebraska courts having decided that the petition was sufficient, presents no question of which the plaintiff in error can complain in this Court.

In addition to the usual costs, the defendant in error ought to be allowed ten per cent. damages, because it clearly appears that the writ of error was sued out merely for delay, and the questions—abandoned in this Court—on which jurisdiction could have been obtained, were frivolous and untenable.

C. J. Phelps,
J. A. Gilmson,
C. O. Sabin,
Attorneys for Defendant in Error.

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1 To the Honorable Samuel F. Miller, justice of the Supreme Court of the United States:

Your petitioner, The Schuyler National Bank of Schuyler, Nebraska, respectfully shows to your honor:

1. A final judgment was rendered in the supreme court of the State of Nebraska, being the highest court of the State in which a decision in the suit could be had, on the 21st day of November, A. D. 1888, against your petitioner, in a suit wherein The Schuyler National Bank of Schuyler was plaintiff in error and John G. Ballong was defendant in error, in the sum of $402.80 and costs.

2. This action was commenced in the district court of Schuyler county by John G. Ballong against your petitioner, The Schuyler National Bank of Schuyler, Nebraska, under section 5198 of the Revised Statutes of the United States, to recover double the amount of usurious and illegal interest alleged to have been charged and received by the said Schuyler National bank to and from the said John Ballong, and, a jury being waived, the cause was heard by the court, and on the 17th day of February, A. D. 1888, the court made findings of facts to the effect that certain loans were usurious, that on those usurious loans the said bank had received $201.40, and was entitled to recover in double the amount of interest actually paid.

The bank filed exceptions to the findings of facts, also a motion for a new trial, on the ground that under the statute the plaintiff could only recover double the usurious interest, whereas the court had found that the defendant must pay double the whole in-

2 terest paid instead of double the usurious interest. The exceptions of the defendant and the motion for a new trial *was* overruled and judgment entered in double the amount of all the interest paid, amounting to $402.80 and costs. The defendant also objected to the trial of the cause because of want of jurisdiction in the court to hear and determine the same.

On the 23d of April, A. D. 1888, your petitioner filed his petition in error in the supreme court of the State of Nebraska to reverse said judgment, and among other assignments of errors were the following:

"First. The court erred in overruling the motion to dismiss said action for want of jurisdiction to try and determine the subject-matter of the action."

"Third. The court erred in the assessment of the amount of recovery in this, that the same is too large, for that the court erroneously permitted the plaintiff in such action to recover double the entire amount of interest found to have been paid to the defendant in said action, whereas he should only be permitted to recover double the amount in excess of the legal rate of interest."

"Fourth. The court erred in permitting the plaintiff to recover upon the fourth cause of action, whereas the same is barred by the statute under which the same is brought, to wit, section 5198 U. S. Revised Statutes." Subsequently this cause came on for argument and final hearing in the supreme court of the State of Nebraska, and

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"Fourth. The court erred in permitting the plaintiff to recover upon the fourth cause of action, whereas the same is barred by the statute under which the same is brought, to wit, section 5198 U. S. Revised Statutes." Subsequently this cause came on for argument and final hearing in the supreme court of the State of Nebraska, and

thereupon, after due consideration of the several assignments of errors, the court overruled the same and affirmed the judgment, as will appear from the opinion of the court attached to the record here presented, with this application, for the inspection of the court.

3 Wherefore your petitioner prays for the allowance of a writ of error by the Supreme Court of the United States and such other process as will enable the petitioner to obtain a review of the case and a correction of the errors alleged.

THE SCHUYLER NATIONAL BANK,
By E. T. HODSDON AND G. M. LAMBERTSON,
Its Attorneys.

I allow this writ of error.
Jan'y 15th, 1889.

SAM. F. MILLER,
Justice Sup. Court U. S.

4 UNITED STATES OF AMERICA, *ss:*

Seal of the Supreme Court of the United States.

The President of the United States of America to the honorable the judges of the supreme court of the State of Nebraska, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The Schuyler National Bank of Schuyler, Nebraska, plaintiff in error, and John G. Bollong, defendant in error, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States, and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause

5 of the Constitution or of a treaty or statute of or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said plaintiff in error, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that

error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the nineteenth day of January, in the year of our Lord one thousand eight hundred and eighty-nine.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—

SAM. F. MILLER,
Justice Sup. Court U. S.

Jan'y 15, 1889.

6 The United States of America to John G. Bollong, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Nebraska, wherein The Schuyler National Bank of Schuyler, Nebraska, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Samuel F. Miller, associate justice of the Supreme Court of the United States, this nineteenth day of January, in the year of our Lord one thousand eight hundred and eighty-nine.

SAM. F. MILLER,
Justice Sup. Court U. S.

7 [Endorsed:] Citation.

On this twenty-fourth day of January, in the year of our Lord one thousand eight hundred and eighty-nine, personally appeared before me, the subscriber, E. T. Hodsdon, and makes oath that he delivered a true copy of the within citation to the within-named John G. Bollong, at Schuyler, in Colfax county, Nebraska, on the twenty-fourth day of January, A. D. 1889; and further deponent saith not.

E. T. HODSDON.

Sworn to and subscribed this twenty-fourth day of January, A. D. 1889.

[Notarial Seal, Colfax County, Nebraska.]

G. B. DOUGHTY,
Notary Public.

8 Pleas before the supreme court of the State of Nebraska at a term thereof begun and holden at the capitol, in the city of Lincoln, in said State, on the 3rd day of July, 1888.

Present: Hon. M. B. Reese, chief justice; Hon. Amasa Cobb, Hon. Samuel Maxwell, judges.

Attest: GUY A. BROWN, *Clerk*.

THE SCHUYLER NATIONAL BANK OF SCHUYLER, NEBRASKA, *v.* JOHN G. BOLLONG. } Error from the District Court of Colfax County.

Be it remembered that on the 23rd day of April, 1888, there was filed in the office of the clerk of said court a certain petition in error in the words and figures following, to wit:

9 In the Supreme Court of Nebraska.

THE SCHUYLER NATIONAL BANK OF SCHUYLER, NEBRASKA, Plaintiff in Error, *vs.* JOHN G. BOLLONG, Defendant in Error. } Petition in Error.

The plaintiff complains of the defendant for that on the 17th day of February, A. D. 1888, the defendant herein recovered a judgment against the plaintiff herein in the district court of Colfax county for the sum of $402.80 and $— costs of suit in an action pending in said court, wherein the defendant herein was plaintiff and the plaintiff herein defendant. A transcript of the proceedings containing said final judgment is filed herewith. The plaintiff alleges that there is error in said proceedings and judgment in this, to wit:

First. That the court erred in overruling the defendant's motion to dismiss said action for want of jurisdiction to try and determine the subject-matter of said action.

Second. That the court erred in admitting and receiving any evidence under the allegations of this petition in said cause for that the said petition does not state facts sufficient to constitute a cause of action.

Third. That the court erred in the assessment of the amount of recovery in this, that the same is too large, for that the court erroneously permitted the plaintiff in such action to recover double the entire amount of interest found to have been paid to the defendant in said action, whereas he should only be permitted to recover double the amount in excess of the legal rate of interest.

10 Fourth. That the court permitted the plaintiff to recover upon the fourth cause of action, whereas the same is barred by the statute under which the same is brought, to wit, section 5198 U. S. Revised Statutes.

Fifth. That the court erred in receiving any evidence over the objection of the defendant in said action under the fourth cause of

action set forth in said petition, for that the same was incompetent, immaterial, and barred by the statute under which the same was brought, to wit, sec. 5198 U. S. Revised Statutes.

Sixth. That the court erred in receiving any evidence under the twelfth cause of action in said petition stated, for that the same was barred by the statute under which the same was brought, to wit, section 5198 U. S. Revised Statutes.

Seventh. That the court erred in receiving any evidence under the first cause in said petition stated, for that the same was incompetent, immaterial, and barred under the statute under which the same was brought, to wit, section 5198 the Revised Statutes of the United States.

Eighth. That that seventh finding of fact is not sustained by sufficient evidence and is against the clear weight thereof.

Ninth. That the seventh finding of law is contrary to law.

Tenth. That the court erred in overruling the defendant's exceptions to the court's findings both of law and fact.

Eleventh. That the court erred in overruling the defendant's motion for a new trial.

The plaintiff therefore prays that said judgment may be reversed and a new trial granted in said cause, and for such
11 other relief as justice may require.

THE SCHUYLER NATIONAL BANK
OF SCHUYLER, NEBRASKA,
By its attorney, E. T. HODSDON.

Endorsed: 3136. Schuyler National bank *v.* John G. Bollong. Petition in error. Supreme court of Nebraska. Filed Apr. 23, 1888. Guy A. Brown, clerk.

And on the same day, to wit, April 23rd, 1888, there was filed in the office of the clerk of said court a certain transcript in words and figures following, to wit:

12 STATE OF NEBRASKA, }
Colfax County. }

Pleas before the district court of Colfax county, Nebraska, at a term begun and holden in the county of Colfax on the 17th day of Feb., 1888, before Wm. Marshall, judge of said district court.

JOHN G. BOLLONG, Plaintiff,
vs.
SCHUYLER NATIONAL BANK OF SCHUYLER, NEB., Defendant. }

Be it remembered that heretofore, to wit, on the twenty-first day of September, 1887, a petition was filed in the office of the clerk of the district court of Colfax county in the words and figures following, to wit:

In the District Court of Colfax County, Neb.

JOHN G. BOLLONG, Plaintiff,
vs.
SCHUYLER NATIONAL BANK OF SCHUYLER, NEBRASKA, Defendant.

The plaintiff, for an amended petition herein, says that the defendant, The Schuyler National Bank of Schuyler, Nebraska, is a corporation organized and doing business under and by virtue of the laws of the United States relating to national banks, at Schuyler, in said Colfax county, as a banking association, and that said defendant was so organized and doing business during the happening of each and all of the events and facts hereinafter complained of.

13 First. For a first cause of action the plaintiff, complaining of the defendant, says that on or about the 13th of November, 1884, he borrowed from the defendant the sum of $500 and on the same day executed and delivered to defendant his promissory note therefore, payable to defendant's order ninety days thereafter, and defendant then knowingly retained and reserved out of said sum of $500.00 as interest in advance on the same for said ninety days at the rate of 24 per cent. per annum the sum of $31, and plaintiff then and there received out of said loan the sum of $469 and no more; that on the 19th day of March, 1887, he paid to the defendant the sum of $400, and on the 28th day of January, 1887, the sum of $100, being the full amount of the principal sum of said $500 so as aforesaid borrowed on the 13th day of November, 1884, and thereby paid said sum of $31.00 reserved on the 13th day of November, 1884; that said payment of interest so as aforesaid paid by plaintiff to defendant and by defendant knowingly contracted for and received from the plaintiff was at a greater rate of interest than is allowed by the laws of the State of Nebraska and was at the rate of 24 per cent. per annum and was in violation of section 5198 of the Revised Statutes of the United States, corrupt and usurious, and occurred within two years prior to the commencement of this action, and by the said *said* statute of the United States the defendant became and is indebted to the plaintiff in the sum of $62, no part of which has been paid.

Second. And for a second cause of action the plaintiff, complaining of the defendant, says that on or about the 14th day of February, 1885, he executed and delivered to the defendant a new note for said sum of $500, and on the same day paid to the defendant and defendant knowingly contracted for and received from

14 him the sum of $23.25 as and for interest at the rate of 18 per cent. per annum on said $500 for the term and time of ninety days in advance; that said payment of interest was at a greater rate than is allowed by the laws of the State of Nebraska and was at the rate of 18 per cent. per annum and was in violation of section 5198 of the Revised Statutes of the United States, corrupt, usurious, and occurred within two years prior to the commencement of this action, and by the violation of said statute of

the United States defendant became and is indebted to the plaintiff in the sum of $46.50, no part of which has — paid.

Third. And for a third cause of action the plaintiff, complaining of the defendant, says that on or about the 18th day of May, 1885, he executed and delivered to defendant a new note for said sum of $500, and on the same — paid to defendant and defendant knowingly contracted for and received from him the sum of $23.25 as and for interest at the rate of 18 per cent. per annum on said $500 for the term and time of ninety days in advance; that said payment of inter- was at a greater rate than is allowed by the laws of the State of Nebraska and was at the rate of 18 per cent. per annum and was in violation of section 5198 of the Revised Statutes of the United States, corrupt, usurious, and occurred within two years prior to the commencement of this action, and by the violation of said statute of the United States the defendant became and is indebted to the plaintiff in the sum of $46.50, no part of which has been paid.

Fourth. And for a fourth cause of action the plaintiff, complaining of the defendant, says that on August 19th, 1885, he executed to defendant a new note for said sum of $500, and on the
15 same day paid to the defendant and defendant knowingly contracted for and received from him the sum of $23.25 as and for interest at the rate of 18 per cent. per annum on said $500 for the term and time of ninety days in advance; that said payment of interest was at a greater rate than is allowed by the laws of the State of Nebraska and was at the rate of 18 per cent. per annum and was in violation of section 5198 of the Revised Statutes of the United States, corrupt, usurious, and occurred within two years prior to the commencement of this action, and by the violation of said statute of the United States the plaintiff became and is indebted to the plaintiff in the sum of $46.50, no part of which has been paid.

Fifth. And for a fifth cause of action the plaintiff, complaining of the defendant, says that on the 20th day of November, 1885, he executed and delivered to defendant a new note for said sum of $500 and on the same day paid to defendant and defendant knowingly contracted for and received from him the sum of $23.25 as and for inter-st at the rate of 18 per cent. per annum on said sum of $500 for the *sum* of ninety days in advance; that said payment of interest was at a greater rate than is allowed by the laws of the State of Nebraska and was at the rate of 18 per cent. per annum and was in violation of section 5198 of the Revised Statutes of the United States, corrupt, usurious, and occurred within two years prior to the commencement of this action, and by the violation of said statutes of the United States defendant became and is indebted to the plaintiff in the sum of $46.50, no part of which has been paid.

16 Sixth. And for a sixth cause of action the plaintiff, complaining of the defendant, says that on or about the 20th day of February, 1886, he executed and delivered to defendant a new note for said sum of $500, and on said day paid to defendant and defendant knowingly contracted for and received from him the sum of $23.25 as and for interest at the rate of 10 per cent. per annum

on said $500 for the term of ninety days in advance; that said payment of interest was at a greater rate than was allowed by the laws of the State of Nebraska and was at the rate of 18 per cent. per annum and was in violation of section 5198 of the Revised Statutes of the United States, corrupt, usurious, and occurring within two years prior to the commencement of this action, and by the violation of said statute of the United States the defendant became and is indebted to the plaintiff in the sum of $46.50, no part of which has been paid.

Seventh. And for a seventh cause of action the plaintiff, complaining of the defendant, says that on or about the 24th day of May, 1886, he executed and delivered to defendant a new note for said sum of $500, and on the same day paid to defendant and defendant knowingly contracted for and received from him the sum of $23.25 as and for interest at the rate of 18 per cent. per annum for the term of ninety days in advance; that said payment of interest was at a greater rate of interest than is allowed by the laws of the State of Nebraska and was at the rate of 18 per cent. per annum and was in violation of section 5198 of the Revised Statutes of the United States, corrupt, usurious, and occurred within two years prior
17 to the commencement of this action, and by the violation of said statutes of the United States the defendant became and is indebted to the plaintiff in the sum of $46.50, no part of which has been paid.

Eighth. And for an eighth cause of action the plaintiff, complaining of the defendant, says that on or about the 25th day of August, 1886, he executed and delivered to defendant a new note for said sum of $500 and on the same day paid to defendant and defendant knowingly contracted for and received from him the sum of $23.25 as and for interest at rate of 18 per cent. per annum on said $500 for the term of ninety days in advance; that said payment of interest was at a greater rate than was allowed by the laws of the State of Nebraska and was at the rate of 18 per cent. per annum and was in violation of section 5198 of the Revised Statutes of the United States, corrupt, usurious, and occurred within two years prior to the commencement of this action, and by the said statute of the United States the defendant became and is indebted to the plaintiff in the sum of $46.50, no part of which has been paid.

Ninth. And for a ninth cause of action the plaintiff, complaining of the defendant, says that on or about the 26th of November, 1886, he executed and delivered to defendant his two certain new notes for said sum of $500, one being in amount for $400 thereof, due ninety days thereafter, and one for $100, due thirty days thereafter, and on the same day he paid to defendant and defendant knowingly contracted for and received from him the sum of $18.40 as and for interest at the rate of 18 per cent. per annum on said sum of $400 for the term of ninety days in advance and the sum of $1.65 as and for interest at the rate of 18 per cent. per annum on said sum of $100 for the term of thirty days in
18 advance; that said payments of interest, amounting to $20.05,

were at a greater rate than was allowed by the laws of the State of Nebraska and were at the rate of 18 per cent. per annum and were in violation of section 5198 of the Revised Statutes of the United States, corrupt, usurious, and occurred within two years prior to the commencement of this action, and by the violation of said statute the defendant became and is indebted to plaintiff in the sum of $40.10, no part of which has been paid.

Tenth. And for a tenth cause of action the plaintiff, complaining of the defendant, says that on or about the 28th day of January, 1887, he paid to defendant said note of $100 in full of its face value, and on the same day in addition thereto the sum of $1.65, and defendant knowingly contracted for and received the same as and for interest at the rate of 18 per cent. per annum on said $100 for the term of thirty days then past due; that said payment of interest was at greater rate than is allowed by the laws of the State of Nebraska and was at the rate of 18 per cent. per annum and was in violation of section 5198 of the Revised Statutes of the United States, corrupt, usurious, and occurred within two years prior to the commencement of this action, and by the violation of said statute of the United States defendant became and is indebted to plaintiff in the sum of $3.30, no part of which has been paid.

Eleventh. And for an eleventh cause of action the plaintiff, complaining of the defendant, says that on or about the 19th day of March, 1887, he paid to defendant said note for said $400 in full of its face value, and in addition thereto the sum of $4.80, and defendant knowingly contracted for and received said $4.80 as and for interest on said $400, at the rate of 18 per cent. per
19 annum, for the term of twenty-four days then past due; that said payment of interest was at a greater rate than was allowed by the laws of the State of Nebraska and was at the rate of 18 per cent. per annum and was in violation of section 5198 of the Revised Statutes of the United States, corrupt, usurious, and occurred within two years prior to the commencement of this action, and by the violation of said statute of the United States the defendant became and is indebted to the plaintiff in the sum of $9.60, no part of which has been paid.

Twelfth. And for a twelfth cause of action the plaintiff, complaining of the defendant, says that on or about the 4th day of March, 1885, he borrowed from the defendant the sum of $500 and on the same day executed and delivered to defendant a promissory note therefore, payable to defendant's order ninety days thereafter, and defendant then knowingly retained and reserved out of said sum of $500, as interest at the rate of 18 per cent. per annum in advance on said $500 for ninety days, the sum of $23.25 and plaintiff then and there received out of said loan the sum of $476.25 and no more; that said note was renewed from time to time until the 19th day of March, 1887, on which day the plaintiff paid the defendant and defendant knowingly received from plaintiff the sum of $300 on said indebtedness of $500 and then and there and thereby paid to defendant said sum of $23.25 so as aforesaid knowingly reserved and defendant knowingly contracted for and received the same; that said

payment of interest was at a greater rate than was allowed by the laws of the State of Nebraska and was at the rate of 18 per cent. per annum and was in violation of section 5198 of the Revised Statutes of the United States, corrupt, usurious, and occurred within
20 two years prior to the commencement of this action, and by the violation of said statute of the United States defendant became and is indebted to plaintiff in the sum of $46.50, no part of which has been paid.

Thirteenth. And for a thirteenth cause of action the plaintiff, complaining of the defendant, says that on or about the 15th day of June, 1885, he executed and delivered to defendant a new note for said sum of $500 and on the same — paid to defendant and defendant knowingly contracted for and received from him the sum of $23.25 as and for interest at the rate of 18 per cent. per annum on said sum of $500 for the term of ninety days in advance; that said payment of interest was at a greater rate than was allowed by the laws of the State of Nebraska and was at the rate of 18 per cent. per annum and was in violation of section 5198 of the Revised Statutes of the United States, corrupt, usurious, and occurred within two years prior to the commencement of this action, and by the violation of said statute of the United States the defendant became and is indebted to the plaintiff in the sum of $46.50, no part of which has been paid.

Fourteenth. And for a fourteenth cause of action the plaintiff, complaining of the defendant, says that on or about the 11th day of September, 1885, he executed and delivered to defendant a new note for said sum of $500 and on the same day paid to defendant and defendant knowingly contracted — and received from him the sum of $23.25 as and for interest at the rate of 18 per cent. per annum on said $500 for the term of ninety days in advance; that said payment of interest was at a greater rate than was allowed by the law of the State of Nebraska and was at the rate of 18
21 per cent. per annum and was in violation of section 5198 of the Revised Statutes of the United States, corrupt, usurious, and occurred within two years prior to the commencement of this action, and by the violation of said statute the defendant became and is indebted to *to* the plaintiff in the sum of $46.50, no part of which has been paid.

Fifteenth. And for a fifteenth cause of action the plaintiff, complaining of the defendant, says that on or about the 7th day of December, 1885, he executed and delivered to defendant a new note for said sum of $500 and on the same day paid to defendant and defendant knowingly contracted for and received from him the sum of $23.25 as and for interest at the rate of 18 per cent. per annum on said sum of $500 for the term and time of ninety days in advance; that said payment of interest was at a greater rate than is allowed by the laws of the State of Nebraska and was at the rate of 18 per cent. per annum and was in violation of section 5198 of the Revised Statutes of the United States, corrupt, usurious, and occurred within two years prior to the commencement of this action, and by the violation of said statute of the United States the defendant

became and is indebted to the plaintiff in the sum of $46.50, no part of which has been paid.

Sixteenth. And for a sixteenth cause of action, the action complained of, the defendant says that on or about the 10th day of March, 1886, he executed and delivered to defendant a new note for said sum of $500 and on the same day paid the defendant and defendant knowingly contracted for and received from him the sum of $23.25 as and for interest at the rate of 18 per cent. per annum on said sum of $500 for the term of ninety days in advance; that said payment of interest was at a greater rate than was
22 allowed by the laws of the State of Nebraska and was at the rate of 18 — per annum and was in violation of section 5198 of the Revised Statutes of the United States, corrupt, usurious, and occurred within two years prior to the commencement of this action, and by the violation of said statute of the United States the defendant became and is indebted to the plaintiff in the sum of $46.50, no part of which has been paid.

Seventeenth. And for seventeenth cause of action plaintiff, complaining of the defendant, says that on or about the 10th day of June, 1886, he executed and delivered to defendant a new note for said sum of $500 and on the same day paid to defendant and defendant knowingly contracted for and received from him the sum of $23.25 as and for interest at the rate of 18 per cent. per annum on said $500 for the term of ninety days in advance; that said payment of interest was at a greater rate than was allowed by the laws of the State of Nebraska and was at the rate of 18 per cent. per annum and was in violation of section 5198 of the Revised Statutes of the United States, corrupt, usurious, and occurred within two years prior to the commencement of this action, and by the violation of said statute the defendant became and is indebted to the plaintiff in the sum of $46.50, no part of which has been paid.

Eighteenth. And for an eighteenth cause of action the plaintiff, complaining of the defendant, says that on or about the 11th day of September, 1886, he executed and delivered to defendant a new note for said sum of $500 and on the same day paid to defendant and defendant knowingly contracted for and received from him the sum of $23.25 as and for interest at the rate of 18 per cent. per annum on said $500 for the term of ninety days in advance; that said payment of interest was at a greater rate than was
23 allowed by the laws of the State of Nebraska and was at the rate of 18 per cent. per annum and was in violation of section 5198 of the Revised Statutes of the United States, corrupt, usurious, and occurred within two years prior to the commencement of this action, and by violation of said statute the defendant became and is indebted to the plaintiff in the sum of $46.50, no part of which has been paid.

Nineteenth. And for a nineteenth cause of action the plaintiff, complaining of the defendant, says that on or about the 13th day of December, 1886, he executed and delivered to defendant a new note for said sum of $500, and on the same day paid to the defendant and the defendant knowingly contracted for and received from him the

sum of $23.25 as and for interest at the rate of 18 per cent. per annum on said $500 for the term of ninety days in advance; that said payment of interest was at a greater rate than was allowed by the laws of the State of Nebraska and was at the rate of 18 per cent. per annum and was in violation of section 5198 of the Revised Statutes of the United States, corrupt, usurious, and occurred within two years prior to the commencement of this action, and by the violation of said statute the defendant became and is indebted to the plaintiff in the sum of $46.50, no part of which has been paid.

Twentieth. And for a twentieth cause of action the plaintiff, complaining of the defendant, says that on or about the 19th day of March, 1887, he paid to defendant the sum of $300 on said indebtedness of $500 and on the same day executed and delivered to defendant a new note for $200 of said $500.

24 And on the same day paid to defendant and defendant knowingly contracted for and received from him the sum of $9.30 as and for interest at the rate of 18 per cent. per annum on said sum — $200 for the term of ninety days in advance; that said payment of interest was at a greater rate than was allowed by the laws of the State of Nebraska and was at the rate of 18 per cent. per annum and was in violation of section 5198 of the Revised Statutes of the United States, corrupt, usurious, and occurred within two years prior to the commencement of this action, and by the violation of said statute the defendant became and is indebted to the plaintiff in the sum of $18.60, no part of which has been paid.

Twenty-first. And for a twenty-first cause of action the plaintiff, complaining of the defendant, says that on or about the 15th day of June, 1887, he executed and delivered to defendant a new note for said sum of $200, and on the same day paid to defendant and defendant knowingly contracted for and received from him the sum of $9.30 as and for interest at the rate of 18 per cent. per annum on said $200 for the term of ninety days, in advance; that said payment of interest was at a greater rate than was allowed by the laws of the State of Nebraska and was at the rate of 18 per cent. per annum and was in violation of section 5198 of the Revised Statutes of the United States, corrupt, usurious, and occurred within two years prior to the commencement of this action, and by violation of said statute the defendant became and is indebted to the plaintiff in the sum of $18.60, no part of which has been paid.

That the several sums of money so as aforesaid paid by the plaintiff to the defendant as interest and by the defendant
25 knowingly and unlawfully contracted and received from plaintiff amount in the aggregate to the sum of 424.90, whereby and by reason of defendant's violation of said section 5198 of the Revised Statutes of the United States defendant became and is indebted to the plaintiff in the sum of $849.80, for which he demands judgment.

(Signed) C. J. PHELPS AND
J. A. GRIMISON,
Att'ys for Plaintiff.

STATE OF NEBRASKA, } ss:
Colfax County, }

John G. Bollong, being first duly sworn, deposes and says that he is the plaintiff in the foregoing petition; that he has heard the same read and knows the contents thereof, and that the facts therein stated are true, as he verily believes.

(Signed) JOHN G. BOLLONG.

Subscribed and sworn to before me this 21st day of September, 1887.

(Signed) – CLIFTON O. SABIN,
[SEAL.] *Notary Public.*

And afterwards, on the 29th day of October, 1887, the defendant filed his motion in the words and figures following, to wit:

In the District Court of Colfax County, Nebraska.

JOHN G. BOLLONG, Plaintiff,
vs.
THE SCHUYLER NATIONAL BANK OF SCHUYLER, NEBRASKA. } Motion.

26 Comes now the said defendant and moves the court to dismiss the above-entitled action and for ground of its motion says:

1st. That this court has no jurisdiction to try and determine the subject-matter of the above-entitled action.

2nd. That exclusive jurisdiction is by the laws of the United States given to the courts of the United States to try and determine the subject-matter of this action.

(Signed) E. T. HODSDON.

In the District Court of Colfax County, Nebraska.

JOHN G. BOLLONG
vs.
THE SCHUYLER NATIONAL BANK OF SCHUYLER, NEBRASKA. } No. 3339. Journal Entry.

Now, on this 29th day of October, 1887, this cause coming on for hearing on motion of defendant to dismiss this cause for want of jurisdiction and the court, after hearing argument of council and being fully advised in the premises, overruled said motion; to which ruling of the court defendant excepts. Thereupon the court granted leave to defendant to answer instanter and to plaintiff to reply instanter.

And afterwards, on the 29th day of October, the defendant filed in the office of said clerk an answer in the words and figures following, to wit:

In the District Court of Colfax County, Nebraska.

27 JOHN G. BOLLONG, Plaintiff,
vs.
THE SCHUYLER NATIONAL BANK OF SCHUYLER, NEBRASKA, Defendant. } Answer.

The defendant above named for answer to the petition of the plaintiff herein alleges:

First. That the first, second, third, fourth, twelfth, and thirteenth causes of action stated in the plaintiff's petition did not accrue within two years next before the commencement of this action.

Second. That the twelfth and thirteenth causes of action set forth in plaintiff's petition did not accrue to the plaintiffs alone but to him and Martin Herbrick as partners, who is still living.

Third. That it denies each and every allegation in said petition contained.

(Signed) E. T. HODSDON,
Attorney for the Defendant.

THE STATE OF NEBRASKA, } *ss:*
Colfax County, }

E. T. Hodsdon, being first duly sworn, on oath deposes and says that he is the duly authorized attorney for the defendant in the above-entitled action; that the plaintiff is a corporation, and that the facts stated in the foregoing answer are true as he verily believes.

(Signed) E. T. HODSDON.

Subscribed in my presence and sworn to before me this 15th day of October, A. D. 1887.

28 (Signed) M. T. ROBINSON,
Justice of the Peace.

And afterwards, on the 29th day of October, 1887, the plaintiff filed in the office of said clerk a reply in the words and figures following, to wit:

In the District Court of Colfax County, Nebraska.

JOHN G. BOLLONG, Plaintiff,
vs.
THE SCHUYLER NATIONAL BANK OF SCHUYLER, NEBRASKA, Defendant. } Reply.

And now comes the plaintiff, and for reply to the answer of the defendant filed in said action says that he denies each and every allegation of new matter contained in said answer.

(Signed) J. A. GRIMISON AND
C. J. PHELPS,
Attorneys for Plaintiff.

29 STATE OF NEBRASKA, } ss:
Colfax County, }

John G. Bollong, being duly sworn, on his oath says that he is the plaintiff in the above-entitled action; that the facts set forth in his reply above are true, as he verily believes.

(Signed) JOHN G. BOLLONG.

Subscribed in my presence and sworn to before me this 29th day of October, 1887.

(Signed) T. W. WHITMAN,
[SEAL.] *Clerk Dist. Court.*

Thereupon, on the 29th day of October, 1887, this cause came on for hearing and trial to the court, a jury being waived in open court, and the court, after hearing all the evidence adduced, the argument of counsel, and being fully advised in the premises, takes the same under advis-ment.

And afterwards, on the 16th day of February, 1888, defendant filed in the office of said clerk his request in the words and figures following, to wit:

In the District Court of Colfax County, Nebraska.

JOHN G. BOLLONG
vs.
THE SCHUYLER NATIONAL BANK OF SCHUYLER, NEBRASKA. } Request.

Comes now the said defendant and requests the court to
30 state in writing the conclusions of fact found separately from the conclusions of law.

(Signed) E. T. HODSDON,
Att'y for the Defendant.

Conclusions of Facts.

And afterwards, on the 17th day of February, this cause came on to be heard and, the parties in open court having waived a jury, it was submitted to the court upon the pleadings and evidence, and the court, on the request of the defendant, being required to state their conclusions of fact separately from their conclusions of law and being fully advised in the premises, finds as follows as to questions of fact:

1st. Upon the 1st, 5th, 6th, and 15th causes of action the court finds for the defendant because the loans and rates therein described *being* in favor of Sumner Brothers and not the defendant bank.

2nd. Upon the second and third causes the court finds for the defendant because the payment of interest therein claimed was paid more than two years before this action was commenced.

3rd. Upon the 12th and thirteenth causes of action the court finds for the defendant because the causes of action therein de-

scribed, if any, arise in favor of Herbrick & Bollong, and not to this plaintiff.

4th. Upon the 10th cause of action the court finds for the defendant because the amount paid was not in pursuance of a
31 previous agreement so to do.

5th. Upon the 11th cause of action the court finds for the defendant because the amount paid was not in pursuance of a previous agreement so to do and because it was paid to Wallace and not to the defendant.

6th. Upon the 19th cause of action the court finds for the defendant because the amount paid was paid to Wallace and not to the defendant.

7th. Upon the 4th, 7th, 8th, 9th, 14th, 16th, 17th, 18th, 20th, and 21st causes of action the court finds for the plaintiff, and that the defendant contracted for and received the several amounts stated in said causes of action respectively, as therein alleged, and that the sums of the amounts so paid is $201.40. The court therefore finds for the plaintiff on these causes of action and assesses his damages and amount of recovery at the sum of $402.80, and that no part thereof has been paid.

Conclusions of Law.

1st. The loan set out in the 1st, 5th, 6th, and 15th causes of action, according to the evidence, was not in violation of section 5198 of U. S. Statutes, the same being made by Sumner Brothers and not by the defendant bank.

2nd. That the sums of money paid as interest and as alleged in the 2nd and 3rd causes of action was so paid more than two
32 years prior to the commencement of this action.

3rd. That the sums of money in the 12th and 13th causes of action set forth *was* paid as interest by the firm of Herbrick and Bollong and not by the plaintiff alone, as shown by the evidence.

4th. That the sum of money in the 10th cause of action set forth was not paid in pursuance of a previous agreement so to do.

5th. That the sum of money in the 11th cause of action set forth was not paid in pursuance of a previous agreement so to do, and was paid to Wallace and not to the defendant bank.

6th. That the sum of money in the 19th cause of action set forth was paid to Wallace and not to the bank, and therefore, although the original loan was made by the bank, it is not liable in this action for the amount due to Wallace.

7th. That the amounts or sums of money in the 4th, 7th, 8th, 9th, 14th, 16th, 17th, 18th, 20th, and 21st causes set forth *was* contracted for and received by the defendant bank contrary to the provision of section 5198 of the Revised Statutes of the United States, and that double the amount of interest (usurious) paid is the amount of recovery.

(Signed) WILLIAM MARSHALL, *Judge.*

And afterwards, on the 17th day of February, 1888, plaintiff filed in the office of said clerk his motion for a *motion for a* new trial in words and figures following, to wit:

In the District Court of Colfax County, Nebraska.

33 JOHN G. BOLLONG
vs.
THE SCHUYLER NATIONAL BANK OF SCHUYLER, NEBRASKA. } Motion for a New Trial.

Now comes the plaintiff herein and moves this court for a new trial of said action in this court, and for grounds of this motion alleges as follows:

First. The court erred in his findings of fact upon the first, 5th, 6th, and 15th causes of action in plaintiff's petition.

Second. That the court erred in its finding of facts in the second and third causes of action in said petition.

Third. That the court erred in its findings of fact in the 10th cause of action in said petition.

Fourth. The court erred in its findings of facts on the 11th cause of action in said petition.

Fifth. That the court erred in its findings on the 19th cause of action in said petition.

Sixth. That the court's findings of facts on the 1st, 6th, 5th, 15th, 2nd, 3rd, 12th, 13th, 10th, 11th, and 19th causes of action are not supported by sufficient evidence and are contrary to law.

(Signed) C. J. PHELPS AND
J. A. GRIMISON,
Attorneys for Plaintiff.

And after hearing argument of counsel and being fully advised in the premises the court overruled said motion; to which
34 ruling and holding of the court the plaintiff excepted and requested that he be allowed 40 days in which to serve his bill of exceptions; which said request was then and there granted by the court, and upon the same day it was ordered by the court that the defendant upon the 17th day of February might file a motion for a new trial *nunc pro tunc*, and that said motion was overruled; to which ruling and holding of the court defendant then and there excepted and requested that it be allowed 40 days in which to serve a bill of exceptions, which request was then and there granted by the court.

And afterwards, on the 17th day of February, plaintiff filed in the office of said clerk his bill of exceptions to findings of facts and conclusions of law in words and figures following, to wit:

In the District Court of Colfax County, Nebraska.

JOHN G. BOLLONG
vs.
THE SCHUYLER NATIONAL BANK OF SCHUYLER, NEBRASKA.

Exceptions to Findings of Facts and Conclusions of Law Made by the Court and Filed Herein on the 17th Day of February, 1888.

Now comes the plaintiff and excepts to the findings of fact and conclusions of law made and filed herein by this court on said 17th day of February, 1888, in manner and form as follows:

35 The plaintiff excepts to the finding in the first paragraphs of said findings of facts on the ground that the same is not supported by sufficient evidence and is contrary to law.

The plaintiff excepts to the finding in the second paragraph of said findings of facts on the ground that *that* the same is not supported by sufficient evidence and is contrary to law.

The plaintiff excepts to the finding in the fourth paragraph of said findings of facts for the reason that the same is contrary to law.

The plaintiff excepts to the finding in the fifth paragraph of said findings of fact for the reason that the same are contrary to law.

The plaintiff excepts to the finding in the sixth paragraph of said findings of facts for the reason that the same is contrary to law.

The plaintiff excepts to the court's said conclusions of law contained in paragraphs marked 1st, 2nd, 4th, 5th, and 6th.

(Signed) C. J. PHELPS AND
J. A. GRIMISON,
Att'y- for Plaintiff.

And afterwards, on the 17th day of February, 1888, the defendant filed *his* motion for a new trial in words and figures following, to wit:

In the District Court of Colfax County, Nebraska.

36 JOHN G. BOLLONG, Plaintiff,
vs.
THE SCHUYLER NATIONAL BANK OF SCHUYLER, NEBRASKA, Defendant. } Motion for a New Trial.

The defendant moves the court for a new trial of this cause for the following reasons:

1st. That there is error in the assessment of the amount of recovery in this, that the same is too large, for that court erroneously permitted the plaintiff to recover double the entire amount of interest found to have been paid to the defendant, whereas he should only be permitted to recover double the amounts in excess of the legal rate of interest.

2nd. That court permitted the plaintiff to recover upon the fourth

cause of action, whereas the same is barred by the statute under which the same is brought, to wit, sec. 5198, U. S. Revised Statutes.

3rd. That court erred in receiving any evidence under the petition herein for the reason that the same does not state facts sufficient to constitute a cause of action.

4th. Errors of law occurring at the trial and duly excepted to.

5th. That the seventh finding of fact is not sustained by
37 sufficient evidence and is against the clear weight thereof.

6th. That the seventh finding of law is contrary to law.

(Signed) E. T. HODSDON,
Attorney for the Plaintiff.

And afterwards, on the 17th day of February, 1888, the *plaintiff* filed *his* bill of exceptions in words and figures following, to wit:

In the District Court of Colfax County, Nebraska.

JOHN G. BOLLONG
vs.
THE SCHUYLER NATIONAL BANK OF SCHUYLER, NEBRASKA. } Exceptions.

The defendant excepts to the findings of the court in the above-entitled action for the following reasons:

1st. Because the court finds that the plaintiff is entitled to recover upon the fourth cause of action set out in his petition, whereas the evidence shows said cause of action to be barred by the statute under which the same is brought, to wit, section 5198, U. S. Revised Statutes.

2nd. Because the court finds that the defendant contracted for and received from the plaintiff as usury the sum of $201.40, whereas the said defendant received as usury only the sum of $87.70.

3rd. Because the court finds that the plaintiff is entitled to recover the sum of $402.80, whereas he is only entitled to re-
38 cover $175.40.

4th. Because the court finds as matter of law the plaintiff is entitled to recover twice the amount of interest paid, whereas he is only entitled to recover twice the excess of legal interest paid within two years, according to section 5198, U. S. Revised Statutes.

(Signed) E. T. HODSDON,
Attorney for the Defend't.

And upon the same day the court overrules the exceptions of the plaintiff; to which ruling the plaintiff excepts.

And also upon the same day the court overrules the exceptions of the defendant; to which ruling the defendant excepts.

Thereupon it is by the court considered and adjudged that the plaintiff have and recover of and from the defendant the sum of four hundred two and $\frac{80}{100}$ dollars ($402.80) and the costs of this action, taxed at $—.

STATE OF NEBRASKA, } ss:
Colfax County, }

I, F. C. Reinecke, clerk of the district court in and for Colfax county, Neb., do hereby certify that the foregoing is a true and perfect transcript of the amended petition, motion, answer, request, motion for new trial, exceptions to findings of fact and conclusions of law, and final judgment as the same are on file and of record in my office.

Witness my hand and seal this 20th day of April, A. D. 1888.

F. C. REINCKE,
Clerk of the District Court of Colfax Co., Neb. [SEAL.]

39	Transcript	7 75
	2 certificate	50
1 filing		10
		8 35

Paid by defendants.

Now, on this 20th day of April, A. D. 1888, comes the said Schuyler National Bank of Schuyler, Neb., and filed its supersedeas bond in the sum of $805.60, with W. H. Sumner and H. C. Wright as sureties thereon, the execution of which undertaking and the sufficiency of the sureties thereon was by me this day duly approved.

Witness my hand and seal this 20th day of April, A. D. 1888.

F. C. REINCKE,
Clerk Dist. Court. [SEAL.]

(Endorsed:) Supreme court of Nebraska. Filed Apr. 23, 1888. Guy A. Brown, clerk.

And on the same day, to wit, April 23rd, 1888, there was filed in the office of the clerk of said court a certain bill of exceptions in words and figures following, to wit:

40 In the District Court of Colfax County, Nebraska.

JOHN G. BOLLONG
vs.
THE SCHUYLER NATIONAL BANK.

Bill of Exceptions.

Be it remembered that on the trial of this cause in the district court of Colfax county, before William Marshall, judge of said court, at the October, 1887, term thereof, to wit, on the 29th day of October, 1887, the following evidence and testimony was introduced and given to the court and jury by the plaintiff and in his behalf and by the *the* defendant and in its behalf, together with the objections of the said parties to the introduction thereof, the rulings of the

court thereon, and the exceptions of the said parties thereto by them respectively noted, as hereinafter set forth:

Present: The said plaintiff, with his attorneys, Messrs. C. J. Phelps and J. A. Grimison, and also the defendant, by its attorney, E. T. Hodsdon.

(HODSDON:) The defendant objects to the reception of any evidence under the allegations of the petition in this case, and for ground of *his* objection says that the said petition herein does not state facts sufficient to constitute a cause of action.

Which objection was overruled by the court; to which defendant excepted.

41 (HODSDON:) Defendant admits it was a national banking association on April —, 1884, and has been since.

The plaintiff, JOHN G. BOLLONG, to maintain the issue on his part, took the stand and, being duly sworn, as required by law, testified as follows:

(GRIMISON:)

(Question No. 1.) Mr. Bollong, you are the plaintiff in this case, are you not?

A. I am.

2. Mr. Bollong, you may state what transaction, if any, you had with the defendant, Schuyler National Bank, on or about the 13th day of November, 1884.

(HODSDON:) To the reception of any evidence under the first cause of action stated in plaintiff's petition the defendant objects, and for ground of *his* objection says that it is incompetent, immaterial, and barred by the statute under which it is brought.

Which objection was overruled by the court; to which defendant excepted.

Ans. Why, I borrowed $500 from him on that date and gave him a note for the amount.

(HODSDON examines witness:)

3. Mr. Bollong, have you a memorandum there?

A. Yes, sir.

4. In whose handwriting?

A. Do you know my writing?

5. No; let me see it.

(WIT.:) Well, that is it.

6. This you prepared from what?

A. I prepared it from the bank book and note stubs.

42 7. Have you those here?

A. Yes, sir; part of them. I haven't got all of them.

(GRIMISON:)

8. Mr. Bollong, have you a knowledge of the transaction you

are testifying about independent of that record you have in your hand?

A. Yes, sir; I have.

9. A recollection of them?

A. Yes, sir.

10. What are you using that for?

A. Well, to get as near the dates as I could.

(HODSDON continues:)

11. When did you prepare that, Mr. Bollong? When was that memorandum made?

A. I don't remember the time I done it.

12. Since this action was begun?

A. No; before the action was begun I had the account of it.

13. I mean this paper. When did you prepare that paper you hold in your hand?

A. Some days ago.

14. Since this action was begun?

A. I took this off from another one I had; it was worn so I could not use it.

15. It is not the original memorandum you made of the transaction?

A. It is the same thing.

16. It is not the original?

A. Yes, sir; that I took off of those.

17. I am asking you is that the original memorandum.

A. Yes, sir; that is the original.

18. Is it the one you made in the first place?

A. No; it is not the first one that I did make.

19. Is that a part of the memorandum that you made on
43 the 13th day of November, 1884, when this transaction took place?

(COURT:) If he has an independent recollection he better not use the paper.

(GRIMISON:)

20. What else did you do at that time with the defendant?

A. I paid him out of that $31 for interest.

21. How much money did you receive for that?

A. I received $469.

22. Any more than that?

A. No.

23. State, if you can, Mr. Bollong, when you paid the principal sum borrowed at that time.

A. Why, I paid it—well, in January.

24. What year?

A. 1887 I paid $100, and on March 19th, 1887, I paid $400, the balance of the $500.

25. Now, had that first note given, to which you have testified, been renewed from time to time?

A. It was renewed every ninety days until it was paid.

26. The *the* $31 you have testified as having paid. When did you pay that, the first that was reserved out of the money?

A. When I paid the $500 in full.

27. That was—when did you say?

A. 1887; in March.

(PHELPS:) If the court please, we now offer to prove that on the 14th day of February, 1885, that the plaintiff executed and delivered a new note for said sum of $500, and on the same day paid to the defendant and defendant knowingly contracted for and received from him the sum of $23.25 as and for interest at the rate of 18% per annum on said sum of $500 for the term and time of ninety days in advance.

44 To which offer defendant objected on the ground that the same was immaterial, incompetent, and barred by the statute under which the action is brought; which objection the court sustained; to which plaintiff excepted.

(PHELPS:) Now we offer to prove that on or about the 18th day of May, 1885, the plaintiff executed and delivered to defendant a new note for said sum of $500, and on the same day paid the defendant and defendant knowingly contracted for and received from plaintiff the sum of $23.25 as and for interest at the rate of 18% per annum on said sum for the term and time of ninety days in advance.

To which offer defendant made the same objection as before, incompetent, immaterial, and barred by the statute under which the action is brought; which objection was sustained by the court; to which plaintiff excepted.

(GRIMSON:)

28. Mr. Bollong, you have alleged in your petition in the fourth cause of action that on or about the 19th day of August, 1885, you executed and delivered a new note for the said sum of $500, and that on the same day you paid the defendant and defendant knowingly contracted for and received from you the sum of $23.25 as and for interest at the rate of 18% per annum on said $500 for the term and time of ninety days in advance. You may now state to the court what your recollection is of that transaction.

To which question defendant objected as incompetent, immaterial, and barred by the statute under which the action is brought, and that the manner of examination is improper and leading; which objection was sustained by the court.

45 29. State to the court what transaction, if any, you had with the defendant, Schuyler National Bank, on or about the 19th day of August, 1885.

To which question defendant made the same objection as last above, and the court made the same ruling.

Defendant objects to the reception of any evidence under the fourth cause of action on the ground that the same is incompetent, immaterial, and barred by the statute under which this action is brought; which objection the court overruled; to which defendant excepted.

Ans. On the 19th day of August I gave a new note at ninety days, and paid him $23.25.

30. What for?

A. For interest in advance.

31. On how much money?

A. On $500.

32. How long?

A. Ninety days.

33. State, if you know, what rate of interest.

A. 18% per annum.

34. Now, that note you say was given for three months—ninety days?

A. Yes, sir.

35. It would mature about the 20th day of November, 1885. What further did you do about that loan at that time?

A. On the 20th of November I gave a new note again for $500 and paid them $23.25 in advance for interest.

36. On how much?

A. On $500.

37. How long?

A. Ninety days, at the rate of 18%.

(HODSDON:)

38. You say "they." You mean what?

A. Schuyler National bank.

46 39. The last note to which you have referred would mature about what time?

A. The 20th of February.

40. What further did you — at that time in regard to the note?

A. Gave him a new note for $500 again and paid him $23.25 in advance for ninety days on the $500. That was at the rate of 18 % per annum.

41. What did you say that $23.25 was for?

A. For interest.

42. On what?

A. $500.

43. For how long?

A. Ninety days, at the rate of 18 %.

44. Now, that last renewal of which you have testified would mature about what time?

A. February, 1886.

45. About the 24th day of May that note matured. What, if anything, did you do about that loan at that time?

A. Why, I gave them a new note. 1886 you are referring to?

46. Yes; May, 1886.

A. I gave a new note for ninety days to the Schuyler National bank and paid him $23.25 in advance for interest for ninety days on $500, which was at the rate of 18 % per annum.

47. That note would mature in August, about the 25th of August. What further did you do about that loan at that time?

A. I gave a new one again, a note.

48. A new note for how much?

A. $500.

49. What else did you do?

A. To the Schuyler National bank and paid him $23.25 interest on that $500 for ninety days, which was at the rate of 18 % per annum.

47 50. Now, that last renewal of which you have testified would mature about the 26th day of November, 1886. What, if anything, did you do about the loan at that time?

A. The 26th of November?

51. November, 1886.

A. Why, I gave a new note; no, I gave two notes at that time. One was for $100 at thirty days and the other was for $400 at ninety days

52. What money, if any, did you pay to the defendant at that time?

A. Well, I paid $18.40 on the $400 for ninety days' interest in advance. That was at the rate of 18%. Then I paid $1.65 on the $100 for thirty days. That was to the Schuyler National bank. That was at the rate of 18%.

53. You may state what you did about that $400 note at or near the maturity of it. Which one of those did you pay?

A. The $100 note.

54. What did you do about the $100 note at its maturity?

A. It overrun thirty days, and I paid it then and paid $1.65 interest.

55. For how long a time?

A. Thirty days.

56. Do you know what rate that was at?

A. That was at the rate of 18% per annum.

57. That was how long, you say, after the maturity of it?

A. Thirty days.

(Hodsdon objects to witness using memorandum.)

58. Mr. Bollong, what did you do with reference to the payment of the note of $400, of which you have testified at its maturity?

A. I renewed it for——

48 59. That $400 note?

A. I renewed it again when it came due for ninety days again.

60. Did you renew it or pay it?

A. I renewed it.

61. What other memorandum have you of that transaction except that memorandum you have there?

A. I have an old one home—the original—but I have carried it

in my pocket a good while and it got wore out, so I just took one off from that.

62. Copied it?

A. Yes, sir.

63. Is that at home now?

A. Yes, sir.

64. Well, go home and get it.

(WIT.:) Why, I took bank books and commenced from that and memorandums that I had at the time that I paid in the money.

65. Have you your bank book here, notes and checks?

A. Yes, sir; I hav'n't got them all.

(PHELPS:)

66. There, take the notes themselves and testify from them.

67. What occurred between you and the defendant, Schuyler National Bank, at the time of the maturity of that $400 note?

A. Renewed it for ninety days.

68. Look at the note—the paper—and see when it was paid; see if it is ninety days.

A. November 26th—the one you mean?

69. Yes; the one you made at that time; how long was it for?

A. Oh, no; I paid that on the 19th of March—that $400.

70. What else did you pay, if anything, at that time besides the note?

A. On the 19th?

71. At the time you paid that $400 note in full; what else
49 did you pay to the bank? Did you pay any interest at the time overdue—past maturity?

A. Yes, sir. Why, there was twenty-four days overdue from the ninety days at the time I paid it, and I paid him $4.80 besides the $400.

72. What was the $4.80 for?

A. For twenty-four days' overdue interest.

73. On how much money?

A. $400.

74. What rate of interest was that?

A. 18 %.

75. That then disposed of that first loan of $500 in full?

Ans. Yes, sir.

(HODSDON:) Now, Mr. Bollong, I must insist that you put that memorandum up.

(COURT:) Oh, yes; you have no right to use that at all.

76. Mr. Bollong, state what other transaction, if any, you had with the defendant, Schuyler National Bank.

Ans. Well, on the 4th of March——

77. On the 4th of March what transaction did you have with the defendant?

A. Borrowed $500.

78. 4th of March, what year?

A. 1885.

(HODSDON:) As to the reception of any evidence under the 12th cause of action, stated in the plaintiff's petition, the defendant objects on the ground that it is incompetent, immaterial, and barred by the statute under which this action is brought.

Which objection the court overruled; to which defendant excepted.

79. Now, go on and state what occurred at the time you borrowed that $500.

50 A. I borrowed $500 and gave a note for ninety days for that $500 and he gave me $476.75.

80. Did he give you any more?

A. No.

81. What was that $23.25 reserved out for?

A. For interest.

82. On how much money?

A. On $500.

83. How long?

A. Ninety days at 18% per annum.

84. Now see if you can tell when you paid that $500 note or any part of it.

A. I paid $300 in March, 1887; it was the 18th or 19th of March.

85. Now we get back to about the 4th of March, 1885, the time you say you made that loan and gave a note for three months in advance. When that note matured what further did you do?

A. I renewed it for ninety days.

86. About when would that be?

A. In June; the 4th or 6th of June.

87. What year?

A. 1885.

(HODSDON:) To the reception of any evidence under this allegation of the petition defendant objected as incompetent, immaterial, and barred by the statute under which the action is brought.

(PHELPS:) We now offer to show that on or about the 5th day of June, 1885, that plaintiff executed and delivered to defendant a new note for said sum of $500, and on the same day defendant knowingly contracted for and received from him the sum of $23.25 as and for interest at the rate of 18% per annum on said sum of $500 for the term of ninety days in advance, and that the same was at a greater rate of interest than allowed by the laws of the

51 State of Nebraska.

To which offer defendant objected as immaterial and barred by the statute under which the action is brought; which objection the court sustained; to which plaintiff excepted.

88. Now we pass from that note of the 5th of June and go to three months later, about the 10th or 11th of September; at that time what transaction did you have, if any, with the bank in regard to the loan about which you have testified?

A. Gave the bank a new note at 90 days again and paid $23.25 interest in advance on $500 for ninety days.

89. At what rate per cent.?

A. 18%.

90. That was the tenth or 11th of September?

A. Yes, sir.

91. A note for three months, you say?

A. Yes, sir.

92. Which would mature——

A. Mature in September.

93. What further did you do about this loan of which you are speaking at that time?

A. Renewed it for ninety days again for the $500 and paid into the Schuyler National bank *at* $23.25 interest on the $500 for ninety days, which was at the rate of 18%, in advance.

94. That three months would expire some time in March; at the expiration of that note, then, what did you do further about that note?

A. I gave him a new note again for 90 days—the Schuyler National bank; paid them $23.25 in advance for interest on the $500 for ninety days at 18% per annum.

95. This payment you have testified to was about when?

A. About the tenth of March; I guess from the 7th to the 10th.

96. At the maturity of that note what did you further
52 do in regard to it?

A. That was in June, about from the 7th to the 10th; I gave them a note again for $500 and paid the bank, Schuyler National bank, $23.25 for interest in advance on the $500 for ninety days, which was 18% per annum.

97. This was the tenth day of June, what year?

A. 1886.

98. At the maturity of that note that you gave at that time what further did you do about this note?

A. It matured in September and I have a new note again.

99. For how much?

A. For $500 at ninety days and paid them $23.25, to the Schuyler National bank, in advance for interest on the $500 for ninety days, which was at the rate of 18% per annum.

100. That was on the 10th or 11th of September, you say, of what year?

A. 1886.

101. At the maturity of this last note what further did you do about this loan?

A. I renewed it again.

102. About when?

A. Gave a new note about the 10th or 12th of December and paid the bank—Schuyler National bank—$23.25 in advance for interest on the $500 for ninety days, which was at 18% per annum.

103. Well, at the maturity of the last note of which you have testified what further did you do?

A. Why, that matured in March.

104. March of what year?

A. 1887.

105. Go on and state what transaction you had with the bank, defendant, at that time.

A. I paid them three hundred dollars then and gave him a note for $200, ninety days.

106. Pay him anything?

A. Paid the first interest up on that.

107. How much was it?

A. $23.25; that is where I paid in that first interest.

53 108. Did you pay any interest on this $200 that remained there?

A. Yes, sir; $9.30.

109. Interest on how much money?

A. $200 for ninety days, paid in advance, which was 18 % per annum for interest.

110. $9.30, you say?

A. Yes, sir.

111. Well, at the end, at the maturity of that last note of which you have spoken, that was made in March, what further transaction, if any, did you have with the bank, defendant, in regard to it?

A. Well, in June, I gave a new note for $200 for ninety days and paid $9.30 in advance for interest.

112. What year?

A. 1887.

113. Do you know what rate that was?

A. 18% per annum.

114. That was in June, 1887?

A. Somewhere about the 15th to the 18th.

115. At the maturity of the last note, of which you have testified, what did you do?

A. The $200?

116. When did it mature?

A. It matured in September.

117. You have not done anything further about it?

A. No; I have not done anything about it.

118. That is the end of it?

—. ——.

119. Mr. Bollong, where is the defendant, Schuyler National Bank, doing business?

A. Where is he now?

120. Where is it doing business; what county and State?

A. Schuyler, Colfax county.

54 121. Where did this transaction of which you have testified occur?

A. In Schuyler.

122. At the place of business of the defendant?

To which question defendant objected as immaterial; which objection the court overruled; to which the defendant excepted.

Ans. Yes, sir.

123. In this county?
A. Yes, sir.

Plaintiff rests.

Defendant's Testimony.

Whereupon the defendant, to maintain the issue on its part, called W. H. SUMNER as a witness, who, being duly sworn, as required by law, testified as follows:

(HODSDON:)

124. Mr. Sumner, where do you reside?
A. Schuyler, Colfax county.
125. What official position do you hold in the Schuyler National bank?
A. Cashier.
126. Have been for how long?
A. Since September, 1884.
127. Have you charge and custody of the books and records of said bank?
A. Yes, sir.
128. State what book that is. State to the court.
A. Discount register.
129. Now, first I will call your attention to a transaction that took place between the bank and the plaintiff on the 13th day of November, 1884. State the facts about that transaction.
A. On the 13th or on the 14th day of November, 1884, Sumner Brothers loaned $500 to Mr. Bollong for ninety days. The bank did not loan it to him.
55 130. What Mr. Bollong?
A. J. G. Bollong.
131. John G., this plaintiff?
A. John G. Bollong.
132. Well, go right on and state the transaction fully.
A. Well, that is all there is to it; Sumner Brothers loaned him $500; the bank did not loan him anything.
133. To whom was the interest paid?
A. Sumner Brothers.
133½. To whom was it paid?
A. The interest was retained from the note by Sumner Brothers; they gave Mr. Bollong a check for the balance, the proceeds of his $500 note.
134. How much was retained?
A. $31.
135. That $31 was retained, wasn't it? Now, they allege in the petition that it was on the 13th day of November, 1884. Is that the $500 note that Mr. Bollong had at that time?
A. That is the note; he did not get it, not until the 14th.
136. And so it was.
Ans. Sumner Brothers' check, dated the 14th; his check was

dated the 13th; it may have come in after 3 o'clock in the afternoon of the 13th.

137. But it is the identical note as charged here in the petition.

A. Yes, sir.

138. Now, this $31 they charge with the defendant, Schuyler National Bank, retained; now, that $31 was credited to whose account on the bank books?

A. Not to anybody's account.

139. Whose account was it placed to?

A. The check that Sumner Brothers gave was for $469; that was charged to their account; they received the $31.

140. Whose funds was that check drawn on?

A. Sumner Brothers.

56 141. Now, as to the transaction on the 14th day of February, 1885, I want to call your attention to that. State fully about that matter.

A. That was renewed. The note was renewed for ninety days *for* (by) Sumner Brothers, and they received the interest.

142. How was that; any interest paid?

A. I don't remember. I presume it was paid in cash.

143. The next transaction is the third cause of action charged in the petition, which is on the 18th day of May, 1885. State about that. With whom was that had?

A. That was with the bank.

144. Now, the next transaction was on August 19th, 1885. With whom was that?

A. That was with the bank.

145. Now we pass down to the 5th. Well, we will just ask first about that—the fifth cause of action. They set up on the 20th of November, 1885, the defendant executed a note to the Schuyler National bank; the Schuyler National bank charged a certain amount of interest. State about that transaction.

A. That money was loaned to Mr. Bollong by Sumner Brothers. The bank note was paid.

146. How did Sumner Brothers pay it?

A. By check.

147. How much interest was taken by Sumner Brothers?

A. $23.25.

148. The bank have no concern with that transaction?

A. No, sir.

149. We pass to the sixth cause of action, the 20th day of February, 1886. State about that transaction.

A. That note was renewed by Sumner Brothers.

150. To whom was the interest paid?

A. Sumner Brothers.

151. How much interest?

A. $23.25.

152. Did the bank have any concern with that transaction

57 or not—interested in it in any way?

A. No, sir.

153. The next was on May 20th, 1886; that was the 7th cause of action?

A. On May 20th, 1886, the bank loaned Mr. Bollong $500.

154. And the amount of interest was——

A. $23.25.

155. Now, the next transaction is on the 25th of August. You may state in regard to that.

A. The bank renewed Mr. Bollong's note for ninety days.

156. That transaction, you say, was with the bank?

A. Yes, sir.

157. The next transaction I will call your attention to is set up in the ninth cause of action, on the 26th of November, 1886. State the facts in regard to that.

A. The note was renewed by one note for $100, thirty days, and one for $400 for ninety days.

158. Well, state what became of the $100 note.

A. The $100 note was paid about the 28th of January, 1887; the other one was sold to a man in Omaha and paid about the 15th of March—the 19th of March.

159. Who received the proceeds of it?

A. The $400 note, sold to Mr. Wallace, of Omaha, was paid in March, 1887—the 19th of March, 1887—and Mr. Wallace received the amount of the note.

160. The entire amount collected on that note was paid to Mr. Wallace?

A. I don't remember; I think so; he might have deducted a little exchange, something like that.

161. Now, I will call your attention, Mr. Sumner, to a transaction which the plaintiff alleges that he had with the Schuyler National bank on the 4th day of March, 1885. State about that transaction.

58 A. On or about the 4th of March, 1885, the firm of Herbrick & Bollong borrowed $500 of the Schuyler National bank.

162. Who paid that interest?

A. It was retained from the note.

163. Whose account was the proceeds credited to?

A. Herbrick & Bollong.

164. Well, when was that note renewed?

A. About the 5th of June, 1885.

165. By whom?

A. Herbrick & Bollong.

166. Who paid the interest on it?

A. Herbrick & Bollong.

167. To whose account was the check that paid it charged?

A. I have got no record of that here; I don't know whether it was paid by check or cash.

168. Do you know who paid it?

A. Herbrick & Bollong.

169. That was renewed next when—after June 5th?

A. It was renewed about the 11th of September, 1885, and by John G. Bollong, but the firm dissolved, I think.

170. When was that note renewed again?

A. It was not renewed again.

171. It was paid?

A. Paid.

172. Well, under the 15th cause of action plaintiff charges that on the 7th of December that he executed and delivered to the bank a note. State about that transaction of the 7th.

A. On about the 7th of December Sumner Brothers——

173. What year?

A. 1885—Sumner Brothers loaned Mr. Bollong $500.

174. What Bollong?

A. John G. Bollong.

175. What interest was charged, if any?

A. 18%.

176. How much?

A. $23.25.

59 177. To whose account was that placed?

A. Sumner Brothers; Sumner Brothers gave a check for $500 less the interest.

178. And that was renewed when?

A. It was renewed—it was paid in March.

179. That was renewed by whom?

A. He borrowed money of the bank again in March and paid that note.

(PHELPS:)

180. March, 1886, that would be?

A. Yes, sir.

181. When was that renewed?

A. When was the March note renewed?

182. Yes, sir.

A. In June.

183. By whom?

A. By John G. Bollong.

184. Who to?

A. To the bank.

185. When was that note renewed again?

A. It was renewed on the 11th day of October, but the note was dated the 11th of September.

186. Why?

A. At the time the old note was due, it took him a month to get around there.

187. What was done with that note?

A. That note dated September?

188. Yes, sir.

A. That was sold to Mr. Wallace, of Omaha.

1889. What was done with it when it became due?

A. Renewed by Mr. Wallace.

190. Who received the proceeds—interest?

A. Mr. Wallace.

191. Now, that note that was renewed in December; state if you know anything further about that note.

A. About the $500 note in favor of Wallace?

192. Yes, sir.

A. Yes, sir; I loaned Mr. Bollong $200 about the 19th of March to help pay it.

193. Take his note—you mean "you" or the bank?

A. The bank.

60 194. What became of that note?

A. It was renewed in June.

Cross-examination.

(PHELPS:)

195. Mr. Sumner, if we understood you right about a note for $500 executed and delivered February 20th, 1886, you said that it was executed and delivered to Sumner Brothers?

A. February 20th, 1886?

196. Yes, sir.

A. Yes, sir; Sumner Brothers loaned him the money.

197. You took the note in the name of the Schuyler National bank?

A. We often do that—endorse it without recourse. We have printed blanks. It was overlooked. That is Sumner Brothers' number. That never was a bank note. It was not endorsed as it should have been.

198. As a matter of fact, that note was taken in the name of the Schuyler National bank and was not endorsed?

A. It was not endorsed, but belonged to Sumner Brothers.

199. Is that the note (handing witness paper)?

A. That is the note, I guess.

(PHELPS:) We offer that in evidence.

The same is hereto attached, marked Exhibit No. 1, and made a part of this bill of exceptions.

200. Mr. Sumner, this firm that you speak of, of Sumner Brothers, how long has that firm existed?

A. About nineteen years.

201. It was originally organized and for many years carried on for the purpose of doing a general merchandise business?

A. Yes, sir.

202. After the organization and incorporation of the Schuy-

61 ler National bank that copartnership for the purposes for which it was formed ceased doing the business for the purposes for which it was originally formed?

To which question defendant objected as improper cross-examination, and that the question assumed facts that were not proved and established in evidence; which objection was overruled by the court; to which ruling defendant excepted.

Ans. Why, the firm of Sumner Brothers ceased doing a general merchandise business long before the organization of the Schuyler National bank.

203. Now, who are the members or who were the members of Sumner Brothers? Who are the Sumner Brothers?

A. Charles E. Sumner and myself.

204. And the same Charles E. Sumner is president of the Schuyler National bank?

A. Yes, sir.

205. And you are cashier?

A. Yes, sir.

206. And have been all the time?

A. Not all the time.

207. Since September?

A. 1884.

208. Now, Sumner Brothers, as a copartnership doing business, ceased to exist as a copartnership long before the organization of this bank?

A. Oh, no.

Defendant here objected as incompetent, immaterial, and improper cross-examination, and assuming legal conclusions; which objection was overruled by the court; to which defendant excepted.

Ans. No, sir; they have not ceased yet.

62 209. It was originally, as I understand you, created for the purpose of carrying on a general merchandise business?

A. Well, they did all kinds of business; bought and sold real estate.

210. But as bankers they did business under the name of Sumner & Company, did they not?

A. Sumner Brothers never did a banking business.

211. Sumner Brothers, as a matter of fact, did a banking business under the firm name of Sumner & Company?

A. The two Sumners; yes, sir; the same members.

212. The same members, Charles Sumner and yourself, did business under the firm name of Sumner & Company?

A. Yes, sir.

213. And for years they did a banking business under that firm name?

A. Yes, sir.

214. How long did you do business under that firm name?

A. Sumner & Company?

215. Yes, sir.

A. From 1884 some time until—from 1874 until 1884.

216. From 1874 until early in 1884 you and Charles C. Sumner did business as bankers, under the firm name of Sumner & Company?

A. Yes, sir.

217. And during a portion of that time you were doing general merchandise business under the firm name of Sumner Brothers?

A. Yes, sir.

218. There is no firm doing merchandise business now?
A. No.
219. Nor no time during the last three years?
A. No; their successors are.
63 220. That is, E. L. True & Co.?
A. Yes, sir.
221. Now, these transactions that you speak of where Sumner Brothers loaned the plaintiff money at these several times you have spoken of, this was done in the Schuyler National bank?
A. Yes, sir.
222. By the officers of the Schuyler National bank?
A. Yes, sir.
223. The application was made to them in the bank?
A. I presume so.
224. And these officers of the bank loaned money and received interest over the counter of the Schuyler National bank?
A. I guess so.
225. Now, we will go back to the first transaction on November 14th, 1884, when you say Sumner Brothers loaned John G. Bollong $500. Now, will you be good enough to relate just how that transaction took place, what was said by John G. Bollong, and what was done by you?
A. I would not undertake to say at this time what was said; all I can say is what the books show was done.
226. What books have you reference to?
A. Well, I have examined the bank books.
227. This discount register you speak of?
A. I don't find anything on here—the bank discount register. I found Sumner Brothers' check for $469 in favor of Bollong. I found—the cash book of the bank—that this check was charged to Sumner Brothers on the 14th of November and credited to Mr. Bollong.
228. And the check at the time he gave his note, the officers of the bank there, president, executed a check of Sumner Brothers and that was deposited at that time?
64 A. Yes, sir; I executed it myself.
229. That was not taken away from the bank?
A. Never has been until to-day; filed with Sumner Brothers' papers.
230. Now, this was made payable to John G. Bollong or bearer?
A. Yes, sir.
231. He never saw it, did he?
A. I don't know whether he did or not.
232. What is your best belief about it?
A. I think it is doubtful if he ever saw it.
233. Then, as a matter of fact, he came in there to borrow some money and this note that you speak of was made, executed, and delivered to you, but the payee named was Sumner Brothers?
A. Yes, sir.
234. And you without consultation with him or without referring the matter to him or showing him the check made the check

payable to the bank from Sumner Brothers, and you executed that and placed it on file in the bank and then the bank on its book gave him credit for the deposit of so much money?

A. Why, yes, sir; we gave him credit for the deposit of the check the same as anybody else.

235. Now, that register. Have you the bank's discount register with you? Does it run back to that time you have got there?

A. November, 1884?

236. Yes, sir.

Ans. Yes, sir.

237. Have you any account on that or any entry on that register of this discount of $31?

65 A. No, sir; would not go onto the bank books at all; hasn't got anything to do with it.

238. All that went onto the bank books was a simple entry of a credit to the account of Mr. Bollong of $469, was it not? Was that all that went onto the bank books?

A. I don't know whether I understand the question or nor.

239. I mean with reference to that transaction.

A. No; the check for $469 charged to Sumner Brothers, that had reference to the same transaction.

240. Now, at that time there was retained and not paid to Bollong the sum of $31?

A. Yes, sir.

241. Now, when that note was renewed, as you say, by Sumner Brothers, in February, what interest, if any, was paid?

A. $23.25.

242. Now, you recollect personally that transaction?

A. No.

243. The $23.25 was paid for what?

A. Interest on the 90-day note.

244. Interest in advance?

A. Yes, sir.

245. For ninety days?

A. Yes, sir.

246. On the $500?

A. Yes, sir.

247. Now, when that came due what was done with it?

A. The bank loaned him money to pay it.

248. What was the date of that?

A. About the 18th of May.

249. About the 18th the bank loaned him how much?

A. $500.

250. What did he pay? What other transaction was there?

A. He paid the interest for ninety days, amounting to $23.25.

251. For ninety days in advance?

A. Yes, sir.

66 252. For interest on the $500; what occurred on the 19th day of August, 1885, with reference to that indebtedness of $500?

A. It was renewed.

253. Renewed by the bank?
A. Yes, sir.
254. What was done that day?
A. The note was renewed.
255. Besides being renewed, what did he pay, if anything?
A. Paid the interest.
256. How much?
A. $23.25.
257. On $500?
A. Yes, sir.
258. Three months?
A. Yes, sir.
259. In advance?
A. Yes, sir.
260. Now, on November 20th, 1885, what was done about this $500 indebtedness—the $500 note in the name of the bank; when did it come due?
A. Sumner Brothers loaned him the money to pay it.
261. Now, on that day what interest did he pay?
A. $23.25.
262. Now, that $23.25 was for interest in advance?
A. Yes, sir.
263. Now, there was due upon the note and unpaid August 19th the sum of $500?
A. Yes, sir.
264. And on November 20th Sumner Brothers loaned him just $500?
A. Yes, sir.
265. And he paid Sumner Brothers, if I understand you right, $23.25?
A. Yes, sir.
266. That was for interest in advance?
A. Yes, sir.
267. Who was that $23.25 paid to?
A. I presume it was paid to me.
268. You were cashier of the bank at that time?
A. Yes, sir.
67 269. You drew the note payable to Sumner Brothers?
A. I don't remember about that; I sometimes used the bank blanks.
270. November 20th, 1886?
Ans. November 20th, 1885.
271. Now, this note of Sumner Brothers, taken in favor of Sumner Brothers, was held there in the bank, was it?
A. Yes, sir.
272. Kept there?
A. Yes, sir.
273. Kept the same as a note payable to the bank?
A. All kept in the same way; not all kept in the same places, but all in the vault.

274. Now, February, 1886, this note was renewed that was given on November 20th, was it not?

A. Yes, sir.

275. Do you remember who took the note when it was renewed?

A. No.

276. There was interest paid at that time by the plaintiff?

A. Yes, sir.

277. $23.25?

A. Yes, sir.

278. Interest in advance on $500 for three months?

A. Yes, sir.

279. May 20th, 1886, what was done with the note given by Bollong February 20th, 1886?

A. The bank loaned him money again, $500 for ninety days, and received $23.25 interest in advance, 18%.

280. August 26th, 1886, what was done with reference to it?

A. The same thing.

281. The bank took a renewal note and received the same amount of interest for the same length of time?

A. Yes, sir.

282. November 26th, 1886, what was done?

68 A. Two notes taken; one $100, thirty days, and one $400, ninety days.

283. These were taken in favor of the bank?

A. I think so; I don't remember.

284. And he paid interest in advance?

A. Yes, sir.

285. And they were finally paid in full—these two notes?

A. Yes, sir.

286. Now, when Bollong borrowed the $500, for which renewal notes, either in Sumner Brothers' or the bank's name, was taken from time to time down to the final payment of this $400 and $100 note, there was paid in fact interest at each renewal, or at the giving of each note by Bollong, except only when the *the* first note for $500, the one executed November 14th, 1884, was delivered, and then there was retained out of that $31, which was carried in these renewals until the final payment of the $400 and the $100 note, was there not?

To which question defendant objected as immaterial, irrelevant, incompetent, multifarious, and, furthermore, that it calls for a legal conclusion from the witness; which objection was overruled by the court; to which ruling defendant excepted.

Ans. Well, I will say frankly that I don't know what the question is——

Ans. Well, when Sumner Brothers loaned him the $500, the $31 was retained; when the bank loaned him the money in May, 1885, Sumner Brothers' note was paid; he paid the bank interest in advance in May and August; he paid Sumner Brothers in-

69 terest in advance in November, 1885, and February, 1886.

287. Now, that is, that he paid interest on every renewal in

money that he handed you, or in credit that was extended to him, at each renewal; but when you made the first loan in November, 1884, instead of his paying the interest with any credit that he was entitled to or with money, that the interest of $31 was retained and reserved out of the principal sum represented in the face of the note?

Ans. Hav'n't I answered that two or three times?

288. I don't understand it.

A. I say that when he borrowed that money — November, 1884, the interest was retained.

289. And when that note came due another note was given?

A. Yes, sir; and the interest paid in advance.

290. And when that note came due another note was given?

A. No, sir; it was paid.

291. Paid by Sumner Brothers loaning him money or by the bank loaning him money?

A. By the bank loaning him money in that instance.

292. And then it was paid in full?

A. Yes, sir.

293. That is, it was paid by your lending him the bank's money?

A. He borrowed money of the bank to pay it.

294. To pay Sumner Brothers?

A. Yes, sir.

295. The transaction in each instance was with the officers of the bank?

A. I presume so.

296. Through the medium of the officers of the bank?

A. Yes, sir.

70 297. Now, when Mr. Bollong came to make application for the loan in each instance or for its renewal he came and said he wanted to borrow money, and if he came to renew he said he wanted to renew?

A. I don't remember; I presume he did.

298. The application was made to the same persons and in the same way as you recollect it. You say it would be as you recollect?

A. Would be what?

299. The application for a loan or for a renewal would be made to whoever stood there?

A. Whoever was in charge of the bank; applications are all usually made to me when I am there; if I ain't there they are made to my brother.

300. These applications were either made to you or to your brother;

A. I presume so; yes, sir.

301. In office hours of the bank, when the bank was open?

A. Yes, sir.

302. In the usual every-day business transacted there?

A. Yes, sir.

303. Now, you say on March 4th, 1885, that Herbrick and Bollong borrowed some money. What was that amount?

A. $500.

304. And gave their note for it? Now, was that to the bank?
A. Yes, sir.
305. And at that time there was retained out?
A. $23.25.
306. And when that came due, June 5th, 1885, it was renewed, you say, by Herbrick & Bollong?
A. Yes, sir.

307. Now, I wish to call your attention to a transaction of
71 March 4th, 1885, in which you say that Herbrick & Bollong borrowed the sum of $500. Was the amount of interest charged in advance for three months reserved and retained by the bank; and, if so, how much and what rate of interest?

(HODSDON:) Now, as to the transaction that occurred on March 4th, 1885, the defendant objects to the reception of any evidence thereunder, first, on the ground that it is incompetent, immaterial, and barred by the statute under which this action is brought, and for the further reason that there is a defect of parties plaintiff, in favor of whom this cause of action accrued.

Which objection the court overruled, reserving the right to consider on final finding; to which ruling defendant excepted.

308. Now, in your direct testimony, Mr. Sumner, you say this was renewed September 11th, 1885, and $23.25 paid in advance, did you not?
A. Yes, sir.
309. And when that note became due that it was paid?
A. I don't know whether you would call that a renewal or not. We loaned John Bollong, in September, 1885, to pay Herbrick & Bollong's note; that was virtually the amount of it. I say it is a question in my mind whether it is a renewal of that note when they are different parties.
310. You testified, I believe, that you inderstood it—Bollong renewed it?
A. John Bollong was the principal in this note given in September, 1885.

311. And it was, as you said in your testimony, renewed by
72 Bollong with his, Herbrick's, name dropped out?
A. Herbrick's name dropped out.
312. Bollong was principal?
A. Bollong was principal.
313. When that note given September 11th, 1885, became due—I understood you to say when it became due in September it was paid?
A. Yes, sir.
314. Now, you stated about the taking of one or two or more notes in the name of Wallace—a Wallace of Omaha. Who is Mr. Wallace?
Ans. Cashier of the Omaha National bank.
315. The Omaha National bank is a correspondent of the Schuyler National bank?
A. Yes, sir.

316. And Mr. Wallace is, you stated, the cashier of that bank. Now, when this money was loaned and a note taken in favor of Wallace was it upon any renewal or to pay a note due the bank?

A. What note are you speaking of?

317. Now we will go to September 11th, 1886—this note for $500; that note.

A. That note was sold to Mr. Wallace.

318. That was taken September 11th, 1886, was it?

A. It was dated September 11th. It was taken by the bank October 11th.

319. And when it was taken interest in advance at the rate of 18 % per annum was received by the bank?

A. Yes, sir.

320. And some time or other that was endorsed over to Mr. Wallace, was it not?

A. Yes, sir; some time or other before due.

321. Oh, well, if you want to make it before due all right.

73 Now, after it was endorsed over to Wallace it was sent to him, of course, I suppose, and he immediately endorsed it for collection and returned it, did he not?

A. Yes, sir.

322. And when it came due in December, what was done?

A. It was renewed.

323. Now, it was renewed at the Schuyler National Bank counter.

A. I guess so.

324. And the same signers, with Mr. John G. Bollong, the plaintiff, signed the note with John G. Bollong, that had signed the other notes that had been given?

A. I don't remember about that.

325. Now, from March 4th, 1885, and down to December 13th, 1886, and at the renewals of the note given on March 4th, 1885, no money, in fact, was brought there and paid by plaintiff as the principal of any one of these notes, was it?

To which question defendant objected as incompetent, immaterial, and irrelevant; which objection was overruled by the court; to which ruling defendant excepted.

Ans. If I understand that question, you mean that Mr. Bollong didn't bring the money there to pay that note at any time?

326. Or any one? I ask you if he did, to pay that note or any one of the notes between March 4th, 1885, and December 13th, 1886.

A. He did not pay it with any money he brought in; no.

327. That is what I am asking you, whether he did or didn't.

A. If he had we wouldn't have had any note.

74 328. And all of these notes were taken over the counter of the Schuyler National bank in your ordinary, every-day business of the bank, during office hours of the bank?

To which question defendant objected as immaterial, irrelevant, and incompetent; which objection was overruled by the court; to which ruling the defendant excepted.

Ans. I presume so. I could not state positively.

Redirect examination:

329. Mr. Sumner, how long has this partnership of Sumner Brothers been in existence?

A. Since 1869.

330. State whether they have kept an account with Sumner Brothers when they were in the banking business.

A. Kept an account with Sumner Brothers?

331. With Sumner & Company—whether Sumner Brothers kept an account?

A. They did.

332. State whether they keep an account with the Schuyler National bank.

A. They do.

333. Keep funds on deposit?

A. Most always have a little on deposit. Sometimes it ain't very much—just to keep the wolf from the door.

334. What I want to call your attention to is these accounts here paid as interest on moneys to Sumner Brothers in these loans. Were these loans made out of funds that Sumner Brothers had on
75 deposit at the bank at that time?

A. They were.

335. The interest paid to them and them only?

A. Yes, sir.

Plaintiff here objects as leading; which objection the court sustained.

Defendant rests.

Rebuttal:

The plaintiff, further to maintain the issue on his part, having been sworn before, was recalled as a witness, and testified as follows:

(PHELPS:)

336. Mr. Bollong, in the renewals of these notes, when defendant's witness says that Sumner Brothers loaned you money to pay notes due the bank, did you apply to Sumner Brothers for the money?

To which question defendant objected as immaterial, incompetent, and irrelevant; which objection the court overruled, either to be admitted or rejected on the final determination of the matter in controversy; to which ruling the defendant excepted.

Ans. I applied to the bank; I went to the bank and applied for the money, and they loaned me the money and gave me credit.

337. What do you mean when you say they loaned you money, Sumner Brothers or the bank?

A. It was the bank; I supposed it was the bank.

338. Was there anything said about Sumner Brothers at
76 any time when you borrowed or renewed money there?

A. No.

339. Were you told at any time when you borrowed money there that the bank hadn't money to loan and that Sumner Brothers had, and that they were loaning you Sumner Brothers' money?

A. No.

340. Did you make application to the bank for the loan?

A. Yes, sir.

341. And for renewal?

To which question defendant objected as leading; which objection the court sustained.

342. To whom were your applications for loans made?

To which question defendant objected as incompetent and immaterial; which objection was overruled by the court; to which defendant excepted.

343. To whom were your applications for loans and renewals made in all these transactions?

A. Well, to Charley and Will Sumner.

344. Who were Charley and Will Sumner?

A. Charley, president of the Schuyler National bank, and Will was cashier.

345. Where were these applications made?

A. In the bank.

346. Did you know that you were borrowing there, then, of the bank?

A. No; they gave me credit to the Schuyler National bank when I got the first money.

347. Did you keep an account there during all this time?

A. Yes, sir.

348. And did business with them daily?

A. Yes, sir; my check books were with the Schuyler National bank, and notes.

77 349. Whenever a check was made by Sumner Brothers, if any check was made by Sumner Brothers, to you did you ever see one of them before they were produced by the defendant on this trial?

A. No; I haven't seen them yet.

350. Did you know that Sumner Brothers claimed to lend you money?

A. No; I did not.

Objected to by defendant (no ground stated). Objection overruled by the court; to which defendant excepted.

351. Your application for loans and renewals—were they made in banking hours at the counter of the bank and to the officers of the defendant bank?

A. Yes, sir.

352. Without exception?

A. Yes, sir.

Cross-examination.

(HODSDON:)

353. Mr. Bollong, did you say you did not know that you were borrowing any money of Sumner Brothers?

A. I did not know that I were borrowing from Sumner Brothers.

354. (Handing witness paper.) Did you sign that note?

A. Yes, sir.

355. To whom was that made payable?

To which question plaintiff objected as not the best evidence.

Ans. Well, here I have got the credit of the Schuyler National bank.

356. I ask you to whom was that note made payable.

78 To which plaintiff objected as not the best evidence; which objection was overruled by the court.

357. To whom is that payable?

A. Sumner Brothers.

358. You signed it?

A. Yes, sir.

359. What is the date of it?

A. November 13th. I knew they were Charley and Will. I knew they were the president and cashier of the bank at the time.

360. But you didn't know but what they might have private funds of their own, did you?

A. No; I didn't know.

361. You signed that note, didn't you, Mr. Bollong?

A. Yes, sir.

362. Payable to the order of Sumner Brothers, isn't it?

A. Yes, sir.

363. Dated November 13th, 1884?

A. Yes, sir.

364. Now, did you ever know that you borrowed any money of William Wallace?

A. I knew of a note that I had given them was transferred to William Wallace, and when I gave him another one I took up that one that had been transferred—they had in their possession. I gave them another one in place.

365. You signed that note, did you not?

A. Yes, sir.

366. To whose order was it payable?

A. To William Wallace.

367. Now, Mr. Bollong, as a matter of fact, if Mr. Sumner says that any of this money that he has testified — belongs to Sumner Brothers, you don't know to the contrary, do you?

To which question plaintiff objected as improper cross-examination; which objection the court overruled.

79 Ans. No.

368. And when you went to the bank, as you say, to bor-

row these sums of money, now, as a matter of fact, you don't know whether they loaned it as a bank or whether it was Sumner Brothers' funds or the bank funds?

A. No; only I knew they were doing the Schuyler National bank's business, and I supposed, as every one else, the officers, I thought, was accountable for the bank's proceedings.

369. It was a mere supposition, then, on your part?

A. Well, if you would consider it so.

Redirect examination.

(PHELPS:)

370. At the time you gave that note did you know that it was made payable to Sumner Brothers?

A. I don't remember.

Defendant here objected as improper and incompetent.

Plaintiff rests.

Testimony closed.

STATE OF NEBRASKA, } ss:
Dodge County, }

I, Edwin R. Mocket, one of the stenographic reporters in and for the fourth judicial district of Nebraska, do hereby certify that the above and foregoing is a true, full, and correct transcript of all the evidence offered and given by the respective parties upon the
80 trial of the above-entitled cause, together with the objections and exceptions of the said parties and the rulings of the court upon said objections.

EDWIN R. MOCKETT,
Reporter Fourth Judicial District.

EXHIBIT No. 1.

J. G. BOLLONG }
v.
SCHUYLER NAT. BANK. }

$500.00. SCHUYLER, NEB., *Feb'y* 20, 1886.

Ninety days after date we or either of us promise to pay to the Schuyler National bank or order five hundred dollars, for value received, negotiable and payable, without defalcation or discount, at the Schuyler National bank, Schuyler, Neb., with interest at the rate of ten per cent. per annum from maturity until paid.

Due May 21–24.

No. B 1020.

(Corner where signatures were torn off.—Clerk.)

Schuyler National bank. Paid May 25, 1886. Schuyler Nebraska.

Received of E. T. Hodsdon, att'y for the defendant, for examination the within draft of a bill of exceptions in the case of John G. Bollong *vs.* The Schuyler National Bank of Schuyler, Neb., tried in the district court of Colfax county, Nebraska, at the February,
81 A. D. 1888, term of said court.

Dated March 15th, 1888.

J. A. GRIMISON,
Of Counsel for Plaintiff.

MARCH 27TH, 1888.

Returned the within draft of bill of exceptions to E. T. Hodsdon, att'y for defendant. No changes requested.

J. A. GRIMISON,
Of Counsel for Plaintiff.

The foregoing bill of exceptions is allowed by me and ordered to be made part of the record in the above-entitled cause this 31st day of March, A. D. 1888.

WILLIAM MARSHALL, *Judge.*

THE STATE OF NEBRASKA, } *ss:*
Colfax County, }

I, F. C. Reinecke, clerk of the district court of Colfax county, do hereby certify that the foregoing is the original bill of exceptions in the above-entitled cause as the same is on file in my office.

Witness my hand and seal this 20th day of April, A. D. 1888.

F. C. REINECKE,
Clerk of the District Court, Colfax Co., Neb. [SEAL.]

Filed April 20, 1888.

F. C. REINECKE,
Clerk of the District Court.

82 (Endorsed:) 3136. Schuyler National Bank *v.* John G. Bollong. Bill of exceptions. Supreme court of Nebraska. Filed April 23, 1888. Guy A. Brown, clerk.

And afterwards, to wit, on the 23rd day of Apr., 1888, there issued out of said court a certain summons in words and figures following, to wit:

THE STATE OF NEBRASKA, *ss:*

To the sheriff of the county of Colfax:

You are hereby commanded to notify John G. Bollong that a petition in error has been filed in the supreme court of the State of Nebraska by the Schuyler National Bank of Schuyler, Nebraska, asking the reversal of a judgment against it rendered February 17, term 1888, in a certain cause in the district court of said county, wherein said Bollong was plaintiff and said bank defendant, and to appear before the supreme court, at the city of Lincoln, on the 3

day of July, 1888, then and there to do and receive what the said supreme court shall order in the premises.

You will make due return of this summons on or before the 3 day of July, 1888.

Witness my hand and the seal of said court, at the city of Lincoln, this 23 day of April, 1888.

GUY A. BROWN, *Clerk.* [SEAL.]

[Endorsed:] Supreme court, State of Nebraska. Schuyler National Bank *vs.* John G. Bollong. Summons in error.

83 And afterwards, to wit, on the 28th day of May, 1888, said summons in error was returned and filed, endorsed as follows, to wit:

I hereby acknowledge service of the within summons this 10th day of May, 1888.

JOHN G. BOLLONG,
By J. A. GRIMISON,
Of Counsel in said Action.

Fees.

Service	50
Copy	25
Mil.	5
	80

[Endorsed:] Supreme court of Nebraska. Filed May 28, 1888. Guy A. Brown, clerk.

And afterwards, to wit, on the 20th day of November, 1888, the following judgment was made by said court and entered of record, to wit:

SCHUYLER NATIONAL BANK, Plaintiff,
vs.
JOHN G. BOLLONG, Defendant. } No. 3136.

Error from the district court of Colfax county.

This cause came on to be heard, was taken up and argued by counsel, on consideration whereof the court finds there is no error apparent on the record in the proceedings and judgment of the district court. It is therefore considered by the court that
84 the said judgment be, and the same hereby is, affirmed, and that the defendant recover of the plaintiff his costs, taxed at $—, and that a mandate issue accordingly.

And on the same day, to wit, November 20, 1888, there was filed in the office of the clerk of said court a certain opinion in words and figures following, to wit:

85 SCHUYLER NATIONAL BANK
v.
JOHN G. BOLLONG.

MAXWELL, *J.*:

On the 16th day of August, 1887, the defendant in error brought an action against plaintiff in error in the district court of Colfax county to recover the penalty under sections 5197 and 5198 of the Revised Statutes of the United States for receiving, etc., usurious interest. On the trial of the cause in the court below judgment was rendered in favor of the defendant in error for the sum of $402.80.

The first objection of the plaintiff in error is that the State courts have no jurisdiction of the subject-matter of the action. This question was before the court in Bank *v.* Overman, 22 Neb., 116, 34 N. W. Rep., 107, and the jurisdiction was sustained. It is said (22 Neb., 116, 117; 34 N. W. Rep., 107): "Section 5198 of the Revised Statutes of the United States provides that suits, actions, and proceedings against any association under this title may be had in any circuit, district, or territorial court of the United States held within the district in which such association may be established, and in any State, county, or municipal court in the county or city in which said association is located, having jurisdiction in similar cases." This section removes the impediment to
86 the exercise of jurisdiction created by the act of 1789 (Rev. St. U. S., sec. 711), and expressly confers jurisdiction on the State courts, as above specified, concurrent with the Federal courts in "suits, actions, and proceedings against any association under the banking act." The statutes of the United States extend over every State as a part of its laws; and, although exclusive jurisdiction may be given to the Federal courts, yet, if it is not so given, either expressly or by necessary implication, the State courts, having competent jurisdiction in other respects, may be resorted to. Hade *v.* McVay, 31 Ohio St., 236; Kinser *v.* Bank, 13 N. W. Rep., 59; Ordway *v.* Bank, 47 Md., 217; Clafin *v.* Houseman, 93 U. S., 130; Gruber *v.* Bank, 19 Alb. Law J., 137; Pickett *v.* Bank, 32 Ark., 346; Dow *v.* Bank, 50 Vt., 112; Bletz *v.* Bank, 87 Pa. St., 87. The statute confers authority on the State courts and clothes them with jurisdiction to try cases of this character. The first objection, therefore, is overruled.

2. The second error assigned is that the court permitted the defendant in error to recover twice the full amount of interest paid by him to the defendant. The amount of recovery depends upon the provisions of 5198, which declare "that in case the greater rate of interest has been paid the person by whom it has been paid or his legal representatives may recover back in an action in the nature of debt twice the amount of the interest thus paid from the association taking or receiving the same." Under the banking law of February 25, 1863, usury forfeited the entire loan or debt.
87 This, however, was deemed too severe, hence the act of 1864 was passed, which is sections 5197, 5198 of the Revised Statutes of the United States. These sections limit the rate to that "al-

lowed by law of the State, Territory, of district where the bank is located, and no more," except, etc. The penalty under the act of 1864 for charging illegal interest is "the forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon," and where the greater rate of interest has been paid, twice the amount thereof may be recovered back by the person paying the same or his legal representatives. Hill *v.* Bank, 15 Fed. Rep., 433; Crocker *v.* Bank, 4 Dill, 358; Bank *v.* Garlinghouse, 22 Ohio St., 492; Bank *v.* Overholt, 96 Pa. St., 329; Gray *v.* Bennett, 3 Metc., 522; Wiley *v.* Starbuck, 44 Ind., 298; Bank *v.* Karmany, 98 Pa. St., 65; Bank *v.* Trimble, 40 Ohio St., 629; Bank *v.* Dearing, 91 U. S., 29. In this case the testimony clearly shows that the defendant in error paid to the plaintiff in error more than $200 on the usurious contracts set out in the petition. The court, therefore, did not err in rendering a judgment for twice the amount so paid.

3. It is claimed that the court permitted the defendant in error to testify from a paper called "Memoranda," prepared for him by his attorneys. The courts are not in entire harmony as to the character of the memoranda from which a witness may refresh his memory. The better rule, however, seems to be that the notes and memoranda should have been made up by the witness at the moment or recently after the fact. If they were made up at the distance of months thereafter, ordinarily they will not be sufficient. In other words, where a party relies upon memoranda to refresh his memory, it must appear that at the time he prepares the memoranda he knew it to be correct, and that from such knowledge, with his memory so refreshed, he is enabled to testify from recollections as to the original facts. Anything referred to by a witness to refresh his memory must be shown to the adverse party if so desired, and he may cross-examine the witness thereon, but it is not required to put the paper in evidence. Peck *v.* Lake, 3 Lans., 136; Tibbetts *v.* Sternberg, 66 Barb., 201. Memoranda prepared by the attorneys for the defendant in error is not shown to have been of such a character as would have justified the defendant in error to have refreshed his memory from the same. The witness, however, testified almost entirely from his own memory of the events stated and no prejudicial error seems to have occurred from the partial use of the memoranda. There is no error in the record and the judgment is affirmed.

88

Affirmed.

The other judges concur.

And afterwards, to wit, January 22nd, 1889, there was filed in the office of the clerk of said court a certain bond in words and figures following, to wit:

89 Know all men by these presents that we, The Schuyler National Bank of Schuyler, Nebraska, and Kent K. Ha-den, of Lincoln, Lancaster county and State of Nebraska, are held and firmly bound unto John G. Bollong, of Schuyler, Colfax county, State of Nebraska, in the full and just sum of eight hundred dollars ($800),

to be paid to the said John G. Bollong, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 15th day of January, in the year of our Lord one thousand eight hundred and eighty-nine.

Whereas lately, at a term of the district court held in and for the county of Colfax, in the State of Nebraska, in a suit pending in said court, a judgment was rendered against the said Schuyler National Bank of Schuyler, Nebraska, in the sum of four hundred and two dollars ($402) and costs, and subsequently said suit was taken by a proceeding in error to the supreme court of the State of Nebraska, and after being there duly heard said judgment was in all respects duly affirmed in said supreme court and a final judgment was therein rendered for said sum of four hundred and two dollars and costs, and the said bank having obtained an allowance of a writ of error by order of the Hon. Samuel F. Miller, associate justice of the Supreme Court of the United States, to reverse said judgment in the aforesaid suit, and a citation directed to the said John G. Bollong, citing and admonishing — to be and appear at a Supreme
90 Court of the United States to be holden at Washington on the first Monday of December next:

Now, the condition of the above obligation is such that if the said Schuyler National Bank of Schuyler, Nebraska, and Kent K. Hayden shall prosecute the writ of error to effect and answer all damages and costs and pay said judgment if he fail to make said plea good, then the above obligation to be void; else to remain in full force and virtue.

THE SCHUYLER NATIONAL BANK
OF SCHUYLER, NEBRASKA,
By G. M. LAMBERTSON, *Its Attorney.*
KENT K. HAYDEN.

Approved by Sam. F. Miller—to operate as a supercedeas Jan. 19, 1889—judge Sup. Court U. S.

STATE OF NEBRASKA, } ss:
County of Lancaster, }

Kent K. Hayden, being first duly sworn, upon oath says that he is a resident of Lincoln, Lancaster county, in the State of Nebraska; that he is the cashier of the State National Bank of Lincoln, Nebraska; that he is the owner of real estate in said Lancaster county, State of Nebraska, of the value of five thousand dollars, and he is also the owner of personal property situated in said county and State of the value of ten thousand dollars; that he is worth over and above all his debts, liabilities, and exemptions the sum of ten thousand dollars; and further deponent saith not.

KENT K. HAYDEN.

Subscribed in my presence and sworn to before me this 15th day of January, A. D. 1889.

H. J. WHITMORE,
Notary Public. [SEAL.]

91 (Endorsed:) 3136. United States Supreme Court. The Schuyler National Bank, plaintiff in error, *vs.* John G. Bollong, defendant in error. Bond. Supreme court of Nebraska. Filed Jan. 22, 1889. Guy A. Brown, clerk.

92 STATE OF NEBRASKA, *ss:*

I, Guy A. Brown, clerk of the supreme court of the State of Nebraska, do hereby certify that the above and foregoing is a true and correct transcript of the record in an action lately pending in said court wherein The Schuyler National Bank of Schuyler, Nebraska, was plaintiff and John G. Bollong was defendant.

In testimony whereof I have hereunto set my hand and the seal of said court this 22 day of March, A. D. 1889.

Seal Supreme Court of Nebraska.

GUY A. BROWN,
Clerk Supreme Court of Nebraska.

Fees, $23.15.

Endorsed on cover: Case No. 13,867. Nebraska supreme court. No. 253. The Schuyler National Bank of Schuyler, Nebraska, plaintiff in error, *vs.* John G. Bollong. Filed October 21, 1889.

In Error to the Supreme Court of Nebraska.

Brief of the Plaintiff in Error.

WILLIAM TWOMBLY,
J. G. BROWN,
Attorneys for Plaintiff in Error.

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SUPREME COURT U. S.
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JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893. NO. 38.

THE SCHUYLER NATIONAL BANK OF SCHUYLER, NEBRASKA, PLAINTIFF IN ERROR,

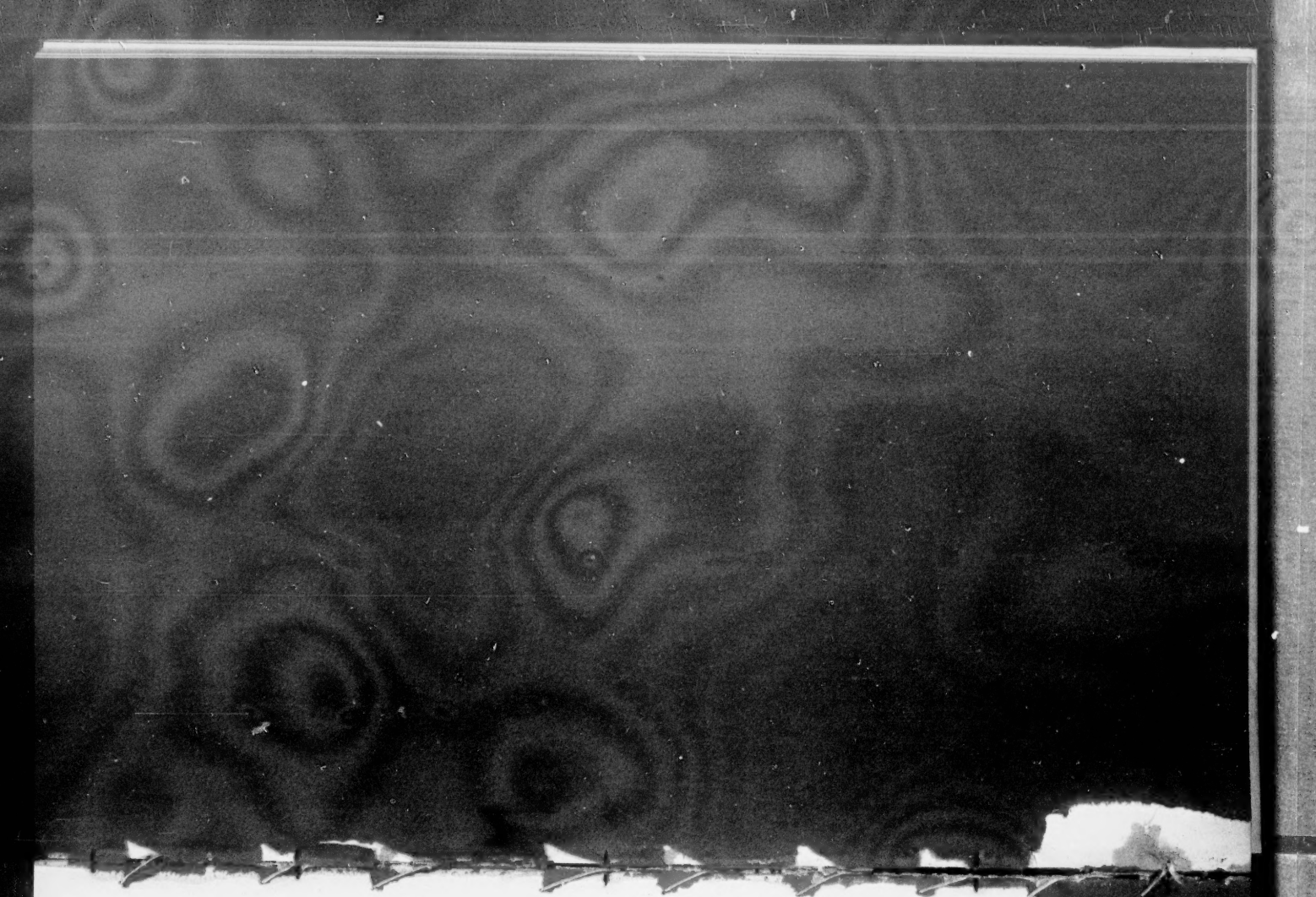
vs

JOHN G. BOLLONG, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF NEBRASKA.

Brief of the Plaintiff in Error.

WILLIAM TWOMBLY,
J. G. BIGELOW,
Attorneys for Plaintiff in Error.



IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893. No. 38.

THE SCHUYLER NATIONAL BANK OF SCHUYLER, NEBRASKA, PLAINTIFF IN ERROR,

vs.

JOHN G. BOLLONG, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF NEBRASKA.

Brief of the Plaintiff in Error.

On the 21st day of September, 1887, the defendant in error filed his amended petition in the District Court of Colfax County, Nebraska, against the plaintiff in error (Rec., 5 to 12). The petition contains twenty-one counts, and purports to state that number of independent causes of action against the bank. Thereby the defendant in error seeks to recover of the bank double the amount of sundry charges of alleged usurious interest. In every instance the allegation is that the rate of interest charged "*was in violation of Section 5198 of the Revised Statutes of the United States*," and no mention nor reference is made to the preceding section, 5197.

On the 29th day of October, 1889, the parties having joined in issue, a trial was had by the court, a trial by jury being waived (Rec., 15); and on the 17th day of February, the court announced its findings on the evidence, for the defendant below on the first, second, third, fifth, sixth, tenth,

eleventh, twelfth, thirteenth, fifteenth and nineteenth causes of action, and for the plaintiff below on the fourth, seventh, eighth, ninth, fourteenth, sixteenth, seventeenth, eighteenth, twentieth and twenty-first counts, for the reasons stated (Rec., 15 and 16), and gave judgment for the plaintiff below for $402.80 (Rec., 19). Both the plaintiff and defendant filed exceptions to the findings and rulings of the court, which were overruled, and thereupon the cause was on writ of error taken to the Supreme Court of the State, and on the 20th day of November, 1888, the judgment of the lower court was affirmed (Rec., 48 to 50). Thereupon the plaintiff in error petitioned for and obtained a writ of error to this court (Rec., 1 and 2).

The following stipulation has been entered into by the parties:

IN THE SUPREME COURT OF THE UNITED STATES,
October Term, 1892. Term No. 253.

THE SCHUYLER NATIONAL BANK OF SCHUYLER, NEBRASKA, Plaintiff in Error,
vs.
JOHN G. BOLLONG, Defendant in Error.
} Stipulation.

It is hereby stipulated and agreed by and between the parties to this action:

That the stipulation for dismissal heretofore entered into, if filed, be withdrawn, and that the order of dismissal, if made, be set aside and said action reinstated.

That this action may be continued to the next term of said court.

That when this cause is reached for trial it, the case of The Schuyler National Bank of Schuyler, Nebraska, *vs.* Neil R. Bollong, trial No. 254, the case of The Schuyler National Bank of Schuyler, Nebraska, *vs.* Neil R. Bollong, original No. 572, and the case of The Schuyler National Bank of Schuyler, Nebraska, *vs.* Hector C. Bollong, original No. 799, may be, by leave of court, heard together and be argued as

one case upon the record of the case chosen by plaintiff in error.

It is further stipulated herein that the plaintiff in error shall file its briefs herein and serve upon the defendant in error copies thereof, on or before the 7th day of August, 1893, and that defendant in error shall file his bries and serve copies thereof on plaintiff in error on or before the 4th day of September, 1893.

Dated Schuyler, Neb., April 25th, 1893.

THE SCHUYLER NATIONAL BANK
OF SCHUYLER, NEBRASKA,
[SEAL] *Plaintiff in Error.*
By order of its Board of Directors,
M. D. CAMERON,
Vice-President.
J. S. JOHNSON,
Cashier.
JOHN G. BOLLONG,
Defendant in Error.
By C. J. PHELPS,
his Attorney.
WILLIAM TWOMBLY,
Attorney for Plaintiff in Error.

Endorsed: Case No. 13,867. Supreme Court U. S. October Term, 1892. Term No. 153. The Schuyler National Bank, P. E., *vs.* John G. Bollong. Stipulation to continue, and that Nos. 254, 572 and 799 be tried with this case as one case, and as to filing briefs. Filed Apr. 30, 1893. James H. McKenney, Clerk.

Subsequently, the following additional stipulations were entered into:

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1893.

THE SCHUYLER NATIONAL BANK OF SCHUYLER, NEBRASKA, Plaintiff in Error,
vs.
JOHN G. BOLLONG, Defendant in Error.
} No. 38.

In addition to stipulations heretofore entered into in this case, now on file herein, it is further stipulated and agreed that the cases of Schuyler National Bank *vs.* Hector C. Bollong, No. 518, and Schuyler National Bank *vs.* Neil R. Bollong, No. 39, shall, by leave of court, be heard together with this case when this case is reached in the regular call of the docket, and be argued as one case.

It is further stipulated and agreed, that whatever judgment may be entered in Schuyler National Bank *vs.* Hector C. Bollong, No. 518, a like judgment may also be entered at the same time, in Schuyler National Bank *vs.* Neil R. Bollong, No. 317, without argument and without printing of the record.

It is further stipulated and agreed, that in case the court will not permit Bank *vs.* Bollong, No. 38, Bank *vs.* Bollong, No. 39, and Bank *vs.* Bollong, No. 518, to be heard together and argued when Bank *vs.* Bollong, No. 38, is reached on call of docket, that Bank *vs.* Bollong, No. 38, Bank *vs.* Bollong, No. 39, and Bank *vs.* Bollong, No. 518, shall be submitted on records and printed arguments, under first section of Rule 20 of this court, when Bank *vs.* Bollong, No. 38, is reached on call of docket.

WILLIAM TWOMBLY,
Attorney for Plaintiff in Error.

Washington, D. C., Aug. 18, 1893.

C. J. PHELPS,
Attorney for Defendant in Error.

Schuyler, Nebr., Aug. 18, 1893.

Pursuant to the foregoing stipulations, the plaintiff in error has selected cause No. 518, in which to discuss the law applicable to the several cases mentioned therein.

The only count, in this suit, in which it is alleged that the indebtedness to the bank was paid before the commencement of this action, is the first count to the declaration, and the court below found in favor of the bank on this count (Rec., 15). That count is out of the case here, as are likewise all the other counts or causes of action in which the issue was found for defendant below.

In all other respects, this case is precisely the same in principle as No. 518, and we refer to our brief therein, and make the same a part hereof.

We here add, however, to what is therein said, that there is no allegation in any of the counts or causes of action in either of these four suits (38, 39, 317 and 518) that either of the several transactions complained of was or is a contract under the laws of the State of Nebraska. In every instance there is a total failure to allege where the notes or other evidences of indebtedness were made, or where payable. There is a total failure to show that the several contracts undertaken to be set out were contracts under the laws of Nebraska. This, we submit, is a fatal omission.

For this reason, as well as for the reasons given in our brief in No. 518, we respectfully submit that the judgment of the Supreme Court of Nebraska ought to be reversed, and judgment given for the defendant below.

WILLIAM TWOMBLY,
J. G. BIGELOW,
Attorneys for Plaintiff in Error.

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Office Supreme Court U. S.
FILED.
SEP 5 1893
JAMES. H. McKENNEY.
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893. NO. 38.

THE SCHUYLER NATIONAL BANK, OF SCHUYLER, NEBRASKA, PLAINTIFF IN ERROR,

v.

JOHN G. BOLLONG, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF NEBRASKA.

Brief of Defendant in Error.

C. J. PHELPS,
J. A. GRIMISON,
C. O. SABIN,
Attorneys for Defendant in Error.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1893. NO. ~~18~~. 38

THE SCHUYLER NATIONAL BANK, OF SCHUYLER, NEBRASKA, PLAINTIFF IN ERROR,

v.

JOHN G. BOLLONG, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF NEBRASKA.

Brief of Defendant in Error.

The statement of the case made by the plaintiff in error is controverted.

On the 16th day of August, 1887, the defendant in error filed his original petition in this case in the District Court of Colfax County, Nebraska, against the plaintiff in error.

On the 23rd day of April, 1889, defendant by leave of the court, filed in said District Court his amended petition (Rec., 5) demanding judgment against plaintiff in error for double the amount of sundry charges of usurious interest theretofore exacted from him by the plaintiff in error.

On the 29th day of October, 1887, the plaintiff in error,

after the disposal of numerous dilatory motions interposed by plaintiff, the plaintiff in error filed its answer (Rec., 14) denying generally every allegation in defendant's petition, to which answer defendant in error filed his reply, denying every allegation of new matter contained in said answer.

Afterwards, and upon the trial of the issues, the court, upon consideration of the pleadings, proofs, and arguments of counsel entered the findings and judgment sought to be reversed in this suit in this court.

The defendant's said petition definitely states that the plaintiff in error is a corporation duly organized and doing business under and by virtue of the laws of Congress relating to national banks, at Schuyler in said Colfax County, as a banking association and was so organized and doing business during the happening of each and all the events and facts complained of in said petition. In each cause of action set out in said petition it is distinctly alleged, as the fact existed, that the defendant in error, on a certain day named, either borrowed, or, being indebted to the plaintiff in error, as the fact existed, in a specific amount named, executed a promissory note, of that date, therefor, due a certain number of days named thereafter; that on that day the plaintiff knowingly contracted for and retained, or received, as the fact was, a specific sum of money named, as and for interest on the amount borrowed, or owing, for the time and term therein named; that the payment of interest made by defendant to plaintiff, and by plaintiff knowingly contracted for and received, was at a

greater rate of interest than is allowed by the laws of Nebraska, stating the rate per annum contracted for and paid, and that it was in violation of section 5198 of the Revised Statutes of the United States, corrupt and usurious, and occurred within two years, prior to the commencement of the action, and by the violation of the statutes of the United States the plaintiff became and was indebted to defendant in a sum named, the amount so named being twice the amount of the unlawful interest so contracted for, received and paid. To say that this manner of demanding judgment for twice the amount of unlawful interest taken, upon the facts alleged, is to declare that pleading facts from which the material fact is inferred is not sufficient is a statement of the law of pleading sadly at variance with the law as generally understood.

The fifth assignment of error in plaintiff's brief, "that there is no allegation in either of the counts or causes of action to the petition that the indebtedness of the plaintiff below to the bank as therein specified, has been paid; and for aught alleged the several transactions complained of are still in fieri," certainly is made without carefully examining the record, for defendant's petition does specifically set out, not only the borrowing of certain sums named, the contracting for, and, in the original borrowing the retaining of a specific sum named being in excess of legal rates, but the petition clearly states that the unlawful rate so contracted for and retained was carried down through a series of renewal notes and finally paid, together with the principal sum

of indebtedness. A perusal of the entire petition is necessary to ascertain this fact, but instances of such payment of indebtedness are found in the 1st, 10th, 11th, 12th, and 19th causes of action (Rec., 6, 9, and 12). And the evidence shows, item by item, as alleged, it was paid.

The first error assigned by plaintiff in error in its brief is, "the complaint of the plaintiff below is fatally defective in that it contains no averment negativing the exception in section 5197 Revised Statutes United States, viz: 'except that where by the laws of any State a different rate is limited for banks of issue organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such state under this title.'"

There are no banks of issue "organized under State laws" in Nebraska. There is no State law in Nebraska authorizing such banks, and, of course, there is no provision in the laws of Nebraska providing a different rate of interest for banks of issue organized under State laws. Moreover, there is no rule of law in the code governing civil procedure and pleadings in Nebraska that either requires or recognizes as proper the pleading of either the existence or nonexistence of a statute of the State. The courts in Nebraska, as everywhere else, take judicial notice of the laws of the jurisdiction in which they sit.

Again, the provision in section 5197 "except that where by the laws of any State a different rate is lim-

ited for banks of issue organized under State laws the rate so limited shall be allowed for associations organized or existing in any such State under this title," does not apply to states having no banks of issue, or laws regulating interest charges by such banks, and does not apply to national banks in Nebraska.

But as applied to Nebraska is simply a matter of law, of which the Nebraska court takes judicial notice, whereas in a state with such banks of issue as are included in said exception, it becomes a question of fact. And this view was held by the Supreme Court of North Carolina in Morgan v. First National Bank of Charlotte, 93 North Carolina, 352.

The 4th error assigned in plaintiff's brief is: "That there is a fatal variance between the allegations of the complaint of the plaintiff below and the requirement of said sections of the Revised Statutes."

The code of civil procedure of Nebraska governing pleading in actions at law both in the Federal and State courts in Nebraska provides: "No variance between the allegations in a pleading, and the proof is to be deemed material unless it have actually misled the adverse party, to his prejudice, in maintaining his action or defense upon the merits," and "Whenever the variance is not material, as provided (above) in the last section, the court may direct the fact to be found according to the evidence and may order an immediate amendment without costs," and further:

giving and having forborne and given day to the said plaintiff for the payment of a certain sum of money, to wit, the sum of $1,854, on the said 25th day of May, 1877, lent and advanced by the defendant to the plaintiff from the said 25th day of May, 1877 until the 25th day of May, 1878, which said sum of $222.46, so taken, accepted, and received by the defendant from plaintiff, in manner, and for the cause aforesaid, exceeds the rate of eight dollars for the forbearance of one hundred dollars for one year, contrary to the form of the statute in such cases made and provided, whereby, and by force of the said statute the said defendant owes the said plaintiff the sum of $454.96, that being double the amount of interest paid to defendant by the plaintiff on the amount of money loaned to plaintiff by defendant as aforesaid, for the space of one year as aforesaid and so foreborne as aforesaid, and thereby and by force of the said statute an action has accrued to plaintiff to demand and have for himself in this behalf and from the defendant the said sum of $444.98.

II. For second cause of action plaintiff, complaining, alleges—

That the said defendant, after the 12th day of February, 1877, and before the commencement of this action, to-wit, 25th day of May, 1878, and at other times and dates subsequent thereto, in the city of Charlotte, N. C., upon certain corrupt and usurious contracts, made after the 12th day of February, 1877, as aforesaid, to wit, on the 25th day of May, 1878, and at other times and dates subsequent thereto, in the city of Charlotte, N. C., aforesaid, between the said defendant, on the one part, and the plaintiff, on the other part, took, accepted, and received of and from the plaintiff certain sums of money, amounting in all to the sum of $793.92, by way of corrupt bargain and loan, for the said defendant, forbearing and giving and having forborne and given day to the plaintiff for the payment of a certain sum of money, to wit, the sum of sixteen hundred and fifty-four dollars,

theretofore, to wit, on the 25th day of May, 1878, and at subsequent times and dates thereto, in the city of Charlotte, N. C., aforesaid, lent and advanced by the said defendant to the said plaintiff, said amount being lent and advanced by the defendant to the plaintiff for sixty days at a time, the whole time from the said 25th day of May, 1878, until the 13th day of June, 1882, the time named, was loaned plaintiff by defendant, being four years and eighteen days, which said sum of $793.92 so taken and accepted and received by the defendant of and from the plaintiff in the manner and for the cause stated as aforesaid exceeds the rate of $8 for the forbearance of $100 for one year, contrary to the form of the statute in such cases made and provided, whereby and by force of the said statute the said defendant forfeited and owes to plaintiff for said offense the sum of $1,587.84, that being double the amount of interest by plaintiff to defendant for the loan and forbearance of the sum of $1,654 from the 25th day of May, 1878, until the 13th day of June, 1882, and thereby and by force of the said statute an action hath accrued to the plaintiff against the defendant for the sum of $1,587.84, for which amount plaintiff sues.

III. For a third cause of action plaintiff complains and alleges that the defendant, after the 12th day of February, 1877, and before the commencement of this action, to wit, on the 25th day of May, 1877, in the city of Charlotte, N. C., upon a certain corrupt and usurious contract made after the 12th day of February, 1877, aforesaid, to wit, on the 25th day of May, 1877, in the city of Charlotte, N. C., aforesaid, between the defendant, on the one part, and the plaintiff, on the other part, took, accepted, and received of and from the plaintiff a certain sum of money, to wit, the sum of $60, by way of corrupt bargain and loan, for the said defendant forbearing and giving day and and having forborne and given day to the plaintiff for the payment of a certain sum of money, to wit, the sum of $1,000, on the said 25th day of May, 1877, until the 25th day of De-

cember, 1877, which, said sum of $60 so taken, accepted, and received by the defendant from the plaintiff in manner and for the causes aforesaid, exceeds the rate of $8 for one year, contrary to the statute in such cases made and provided, whereby and by force of the said statute the said defendant forfeited for said offense and owes to the plaintiff the sum of $120, that being double the amount of interest paid to defendant by plaintiff for the forbearance and loan of the $1,000 for the time as above alleged, and thereby and by force of the statute for usury an action hath accrued to plaintiff against the defendant for the sum of $120, which amount plaintiff claims and sues for.

IV. For fourth cause of action plaintiff, complaining, alleges that the said defendant, after the 12th day of February, 1877, and before the commencement of this action, to wit, on the 25th day of March, 1877, and at other times and dates subsequent thereto, in the city of Charlotte, N. C., upon certain corrupt and usurious agreements and contracts made after the 12th day of February, 1877, as aforesaid, to wit, on the 25th day March, 1878, — at other times and dates subsequent thereto, in the city of Charlotte, N. C., aforesaid, between the defendant, on the one part, and the plaintiff on the other part, took, accepted, and received from the plaintiff certain sums of money at various times, amounting in all to the sum of $377.98, by way of corrupt and usurious bargain and loan, for the said defendant forbearing and giving day to the plaintiff for the payment of $759 theretofore, to wit, on the 25th day of December, 1877, and at subsequent times and dates thereto, in the city of Charlotte, N. C., aforesaid, lent, and advanced to the plaintiff by the defendant, said amount being lent and advanced to the plaintiff by the defendant for sixty days at a time, the whole time from the 25th day of December, 1877, until the 19th day of June, 1882, when plaintiff quit paying usurious interest, being four years five months and twenty-four days, which said sum of $377.98, so taken, accepted, and received by the defendant of and

from the plaintiff, in the manner and for the cause stated as aforesaid, exceeds the rate of $8 for the forbearance of $100 for one year, contrary to the statute in such cases made and provided, whereby the defendant forfeited and owes to the plaintiff for said offense the sum of $755.96, that being double the amount of interest paid by the plaintiff to the defendant for the loan and forbearance of the sum of $759.00 from the 25th day of December, 1877, until the 19th day of June, 1882, and thereby and by force of the said statute an action hath accrued to plaintiff against the defendant for the sum — $755.96, for which amount plaintiff sues.

V. That the plaintiff, in addition to the usurious interest heretofore mentioned, has paid before the commencement of this action all the notes hereinbefore referred to and mentioned, except one note for $759.00 executed, and delivered to the defendant by plaintiff on the 19th day of April, 1882.

VI. That each and every one of the notes constituting the contract hereinbefore set forth were made payable on their face to one M. C. Roberts by plaintiff, and by said M. C. Roberts endorsed.

VII. That said notes so endorsed were received by the defendant as the contracts hereinbefore referred to.

VIII. That the manner of executing said contracts and said endorsements by said M. C. Roberts was in the knowledge and at the request of the defendant.

IX. That said M. C. Roberts received no benefit from said contracts and was only liable thereon as endorser, and bore none of the burdens of same and has no interest in this action.

X. That as to each cause of action hereinbefore set forth subsequent to the first the plaintiff hereby adopts, without repeating the same, the first allegation of the first cause of action. Wherefore the plaintiff demands judgment against the defendant for the sum of $3,000, with interest thereon until paid, and the costs of this action, and other and further relief.

And from the printed brief, on file in this court, of the plaintiff in error in that case it appears in the third assignment (page 7 of said brief) of errors that the same points raised by plaintiff in its first, second, and fourth assignments of error herein were raised, and by the court overruled. The assigament was:

> The complaint does not allege what is the legal interest fixed by the laws of the State, nor does it negative that there are State banks of issue, which by law are allowed a greater rate of interest than is allowed by the general law of the State.

In the last paragraph of the opinion in that case, Mr. Justice Harlan, speaking for the court, says:

> The objection that the complaint does not state facts sufficient to constitute a cause of action, under the act of Congress, is not well taken. It might have been more specific, but enough was alleged to justify the court in overruling the motion in arrest of judgment. The bank filed its answer, and went to trial upon the merits; and as the verdict embraces only illegal interest taken within the two years next preceding the commencement of the action, there is no ground to contend that the judgment exceeded the amount that Congress authorized to be recovered.
>
> Judgment affirmed.

The supreme court in its discision in that case say:

> The appellant's counsel further, in support of his motion in arrest of judgment, urges that the complaint is fatally defective in failing to "negative that there are State banks of issue which by law are allowed a greater rate of interest than is allowed by the general law of the State."
>
> It is to be observed that the complaint avers a taking of interest for a forbearance of a loan of money greater that at the

rate of 8 per centum per annum, and the court judicially takes notice of the fact that this is the maximum allowed by contract under the general law of the State, and that no banking institution incorporated by the State can legally take more.

Why was it necessary to make the averment that the highest legal rate allowed by law was that mentioned, or that no more could be demanded and taken by a State bank?

Each would have been a public law, and when the facts are stated which show its violation and the incurring the penal liability therefor this must be sufficient as a statement of a cause of action against the wrong-doer. It is not necessary, certainly, to say there is no law under which, if there was, the defendant can find shelter for its acts, when the court knows there is none.

It is not like the case of a statute, which is itself qualified by an exception resting upon facts, which facts must be negatived to bring the case under the operation of the law, as the court has had several times occasion to remark, in considering public criminal accusations, in arriving at its true meaning. Here the facts are set out which show that the law has been violated, and this being known to the court, relief will be granted and the wrong redressed.

Upon a full examination of the exceptions in the light of the able argument of counsel in support, we find and so declare that there is no error of which the appellant can complain, and the judgment must be affirmed. It is so ordered.

In Barnet v. Muncie National Bank, of Muncie, Indiana, 98 U. S., 855, Mr. Justice Swayne, speaking for the court, and of that case, commenced in one of the State courts of Ohio, said: "The procedure in this case after it reached the circuit court, as well as before, was governed by the Ohio code of practice" citing R. R. Co.

v. Horst, 93 U. S., 291:

That the statute under consideration is not strictly penal, but in its provisions remedial, will appear when the construction given it by the courts is considered. In Monongahelia National Bank vs. Overholt, 96 Pa. St., 329, the court says, "that the sum so recovered is so penal in character that it is commonly called a penalty; but is not the act in strictness more remedial than penal? Taking interest beyond the prescribed rates is not a criminal offense; does not forfeit the debt or give a qui tam action to an informer, is not denounced by pains and penalties as was usury by the common law of ancient statutes; nor is the right to the person who paid the excessive interest, for it may pass to his legal representatives, and in this respect it is not treated as a penalty or tort to the person. He may recover back twice the amount so paid by an action in the nature of an action of debt. And in Bank vs. Dearing, 91 U. S., 29, the court says " that the 30th section, " referring to this act under consideration, " is remedial as well as penal and is to be liberally construed to effect the object which Congress had in view in enacting it, " citing Gray vs. Bennet, 3 Met. 522-529.

In Lebanon National Bank vs. Karmony, 98 Pa. St., 65, it was held that Sec. 5198 U. S. Rev. Stat. is purely remedial.

And to the same effect see Huntington v. Attrill, 146 U. S., 657–689.

The third error assigned in plaintiff's brief is: "That the supposed causes of action are alleged to have accrued to the plaintiff below by force of section 5198 of the Revised Statutes United States, whereas the same accrued, if at all, under and by force of sections 5197 and 5198 of the Revised Statutes, and not by force alone

of section 5198, as alleged.

In plaintiff's printed brief, at page 13, counsel considers his third and fourth assignment of errors together, and while admitting that the former strict form of pleading has been abolished and the substance only retained, he proceeds to complain of the form only.

The allegation: "That said payment of interest so as aforesaid paid by plaintiff to defendant and by defendant knowingly contracted for and received was at a greater rate of interest than is allowed by the laws of the State of Nebraska and was at the rate of 18 per cent per annum, and was in violation of section 5198 of the Revised Statutes of the United States, corrupt and usurious, and occurred within two years prior to the commencement of this action, and by the violation of said statutes of the United States the defendant became and is indebted to the plaintiff in the sum &c.," is certainly sufficient. If the words "in violation of section 5198" had been omitted, or are treated as surplussage the words "corrupt and usurious" are sufficient, or the words "in violation of the statutes of the United States" are also sufficient.

This action was brought under and by virtue of the remedy secured in section 5198, and not in section 5197. The acts and facts charged in the petition brings the case within the conditions condemned in section 5197, but there is no requirement that more than the facts

shall be pleaded. There was no necessity for a reference to the section where such acts are condemned, nor, for that matter, to section 5198, which gives the remedy. Section 5197 provides what rate may be charged but does not declare the penalty, nor provide the remedy, that is left for section 5198, and there it is found.

Again, section 5198 itself refers to section 5197, in the following words: "The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done etc.," so that the reference in the petition to section 5198, directs attention to the restrictions contained in section 5197, both of which formerly were contained in section 30 of the act of June 30, 1864.

The averment, in the complaint attacked, that the interest charged, contracted for, paid and received "was at a greater rate of interest than is allowed by the laws of the state of Nebraska, is a comprehensive allegation, following as near as may be the language of the statute, and positively negatives the exception contained in section 5,197, and embraces every limit fixed, or which could be determined by legislation on the subject of limiting the rate of interest in the state of Nebraska, either directly, or, in provisions excepting persons or corporations, seems to be "one of those plain propositions which reason can not render plainer."

But, if to maintain the suit, it were necessary that the

pleading, having referred to section 5198, should also refer to section 5197, then are we not without that prop, for in the answer to said complaint, the plaintiff in error supplies the defect, if defect it be, by pleading the exact language in question, and says (Rec., 21), "as provided by sections 5197 and 5198 of the Resvised Statutes of the United States, UNDER WHICH SAID CAUSES OF ACTION ARE BROUGHT."

In Haggard v. Wallen, 6 Neb., 272, it was held: "In cases where the petition is defective for want of a material averment, and such averment is supplied by the answer and is not inconsistent with the averments in the petition, the defects in the petition will thereby be cured, at least after verdict and judgment thereon," citing Erwin v. Shaffer, 9 Ohio State, 44; Insurance Co. v. Kelly, 24 Ohio State, 365.

The fifth error assigned in plaintiff's brief is: "There is no allegation in either of the counts or causes of action to the petition that the indebtedness of the plaintiff below to the bank, as therein specified, has been paid; and, for aught alleged, the several transactions complained of are still in fieri."

As hereinbefore shown the exact opposite of the statement made is true, but in Lebanon National Bank v. Karmony, 98 Pa. St., 65, it is said: "If illegal interest be contracted for the debt shall bear no interest. If such

interest be paid the offending bank is liable in an action for twice the amount. THAT LIABILITY IS INCURRED THE MOMENT THE BANK TAKES THE ILLEGAL INTEREST."

In Monongahela National Bank v. Overholt, 96 Pa. St., 327, it was held that suit for the penalty could be maintained whether the debt had been paid or not, and it had not in that case.

Turning to the cases cited by plaintiff in error in its counsel's brief, we find that in Farmers' and Mechanics' Bank v. Dearing, 91 U. S., 29, the principal question decided is that the penalty prescribed in the Federal act, and not the penalties prescribed by State legislation in the State where the national bank is situated, governs. The court in that case, speaking by Mr. Justice Swayne, held that "It must always be borne in mind that the constitution of the United States, and 'the laws which shall be made in pursuance thereof, are the supreme law of the land' (Const., art. 6), and that this law is as much a part of the law of each State, and as binding upon its authorities and people as its own local constitution and laws. * * * The 30th section (5197 and 5198) is remedial as well as penal, and is to be liberally construed to effect the object which Congress had in view in enacting it," citing Gray v. Bennett, 3 Met., 522, 529.

It follows, and is certainly true, that it was no more necessary to plead in the State court of Nebraska the provisions of the law of the United States than to plead

the law of Nebraska, both of which are taken judicial notice of in such court. Yet, in plaintiff's brief counsel insists that a cause of action is not stated because section 5197 of the Revised Statutes of the United States was not referred to, and because defendant in error did not state "the rate of interest allowed in any case by the laws of the State of Nebraska," so that a court of Nebraska might be informed in the pleadings of what the law of Nebraska is. Certainly a novel purpose of pleading.

The cases cited in the brief of the plaintiff in error, although for the most part decided before the adoption of the more liberal rules of pleading provided under the code system, do not sustain the contention of counsel.

The case of Soper v. Hingham and Quincy Bridge and Turnpike Company, 4 Pick., 341, was a case where the plaintiff did not show in his declaration that he was a person belonging to the class of persons who were given a right of action by the statute under consideration, one "from whom toll is demandable," and the court held: "No person except one from whom toll is demandable, can sustain an action on that statute for an injury so sustained."

"The declaration in such an action should state that the plaintiff is a person from whom toll is demandable; and the want of such an averment, OR OF ALLEGATIONS

FROM WHICH THAT MAY BE INFERRED, is not cured by verdict."

Of the case, to which plaintiff's brief refers, cited by the court in that decision, the opinion says:

> The cases before cited sufficiently establish the rule, that where an action is given by statute, and in another section, or subsequent statute, exceptions are enacted, the plaintiff need not take notice of these exceptions in his count, but leave it to the defendant to set them up in his defense. But where the exception or limitation is contained in the same section which gives the right of action, the plaintiff must negative the application of them to his ground of action. Here unfortunately the qualification of the right of action is contained in the very section which gives the right.

In the case at bar, the exception, as the court will observe, is not contained in section 5198, the one giving the right of action, but in section 5197.

The case of Wayman, et al., v. Southard, et al., cited by plaintiff in error, was where the subject matter involved was the construction of a provision contained in the judiciary act of 1789, C. 20, relative to the issuing of writs by Federal courts, but it was distinctly held that the proviso under consideration was no exception to the enacting clause, which related to the subject under consideration, and has no application whatever to the question here under consideration.

In the case of Spiers v. Parker, where the exceptions in the act specified a number of ships, or different kinds of ships, and deserters from any such ships" might be

lawfully impressed into the service.

The exceptions in the act of Parliament specified a number of ships, or different kinds of ships, and deserters from "any such ship" might be lawfully impressed into the service. The defendant below was the captain in command of the warship Diamond. The declaration undertook to negative the exceptions by alleging that the mariner was not a deserter from the "war-ship called the Diamond." But the court held that the words, "any such ship," must be taken in connection with what went before, and when so taken meant "ships," such as specified in the exceptions, and that the declaration was fatally defective in that it failed to negative all the exceptions by alleging the mariner was not a deserter from any of his Majesty's ships.

Applying the principle to the averment under consideration, "was at a greater rate of interest than is allowed by the laws of Nebraska" do we not in effect say that from which it must be inferred that it was "at a greater rate than is allowed" by any of the laws of Nebraska including any possible exceptions?

The case of Soper v. The President, &c., of Harvard College, 1 Pick., 177, is a case where the action was brought upon statute 1819, c. 37, the first section of which provided that no livery-stable keeper "shall give credit to any under graduate of either of the colleges within this commonwealth without the consent of such officer or officers of the said colleges, respectively, as may be authorized to act in such cases by the government of the same, or in violation of such rules and regulations as shall

be from time to time established by the authority of said colleges, respectively." The 3d section gives an action on the case against the person giving credit to recover a sum equal to the amount which shall be so unlawfully credited. The court held:

> But, for errors manifest in this record, the judgment of the Circuit Court of Common Pleas must be reversed. It is not alleged in the declaration, that any rules have been established on the subject of the statute, nor that any officer has been authorized by the government of the college to give the consent which may be an excuse for the act of giving credit, though it is averred, that the credit was given without such consent. But we think the penalty is not incurred, unless some rules have been made on the subject of giving credit, nor unless some officer has been authorized to give or withhold consent, as the circumstances may require. The giving credit generally is not an offense, but only when it shall be done in violation of rules established by the government of the college. It is an essential fact, which ought to be averred, that such rules have been made.

Of course the State courts could not take judicial notice of whether the colleges had made rules, and what rules, if any. But in the case at bar, the Nebraska court was bound to take judicial notice of what the laws of Nebraska are upon the limitation of interest rates generally, or specially, if any exception in favor of banks of issue existed, as said in the North Carolina case above cited. And therein is the great difference between the Massachusetts case and this case, to say nothing about the more liberal rules of pleading which existed when nearly

all of the cases relied on by plaintiff in error were decided.

The case of Downe v. Simpson, 2 Mass., 444, cited by plaintiff, was where in a prosecution for bastardy, the appellate court considered the evidence in the case and in the opinion discussed the evidence as a basis of their decision, as also whether the proceedings in the case were removed by the proper writ, and finally quashed the proceedings for that reason, and the case was not decided upon the question of the insufficiency of the complaint, and the observation in this case, as in others cited by counsel, was a casual remark upon general rules and not the principle decided in the case.

Bigelow v. Johnson, 13 Johns., 428, was where the complaint set out a violation of one of the offenses contained in a section of the excise law, and upon the trial it appeared that he was, if at all, guilty of another offense named in the same section but not specified in the complaint. The judgment below was, therefore, reversed.

The case of Bartlett v. Crozier, 17 Johns., 440, another case cited by plaintiff in error, was where the action was brought against the overseer of highways for neglect to repair a bridge, and it was held that no right of action existed in favor of a citizen against an overseer or against the commissioners of highways, but if against either, the commissioners of highways. And if the

overseer defending were liable for neglect of duty, it was not shown that it was his duty to repair the bridge.

In Sheldon v. Clark, 1 Johns., 513, cited by plaintiff in error, the decision is flatly against the rule contended for in its brief, and it was held: "In an action against a person for practicing physic against the act, it is incumbent on the defendant to show himself within some of the provisions, and the plaintiff is not bound to negative the provisos in his declaration."

Barrett v. Muncie National Bank of Muncie, 98 U. S., 555, simply decided that the penalty provided by law can not be recouped or counter-claimed in an action brought upon the promissory note or bill of exchange upon which illegal interest was charged or taken.

In the brief of the plaintiff in error, at page 17, counsel contends that "None of the considerations herein presented to the court against the sufficiency of the complaint or petition of the plaintiff below, were called to the attention of the Supreme Court of Nebraska." In answer to this we direct attention to page 33 of the record, where plaintiff in error, upon the trial of the cause, objected to the introduction of any evidence under the petition on the ground that it does not state facts sufficient to constitute a cause of action. This objection was overruled and plaintiff duly excepted.

The sixteenth assignment in plaintiff's petition in er-

ror in the Supreme Court of Nebraska, is for "errors of law occuring at the trial and duly excepted to."

This, under the law and decisions in Nebraska, is a sufficient assignment to raise the question of the sufficiency of the petition, and did raise it, and the decision of that court, in law, covers the point, and is a construction of the law of pleading in that behalf in Nebraska, by the Supreme Court of that state.

The decision in the case of the First National Bank of Charlotte v. Morgan, above cited, was cited and urged in the Supreme Court of Nebraska in one of these cases, that of The Schuyler National Bank v. Hector C. Bollong, and the complaint was quoted in full in the brief there, as it is here. And plaintiff was not in ignorance of that decision when he brought error in that case to this court. And that the writ of error herein was sued out merely for delay, will appear, when we consider the attitude of the plaintiff in his brief, where it fully appears, as therein stated, (page 17) that "none of the considerations herein [therein] presented to the court, against the sufficiency of the complaint or petition of the [defendant] plaintiff below, were called to the attention of the Supreme Court of Nebraska." And the further fact that none of the numerous alleged errors which were urged in the Supreme Court of Nebraska are called to the attention of this